

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

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SANDRA K MARKHAM, CLERK

BY: Jacqueline Harshman

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-EIGHT

JUNE 17, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant.)
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Friday, June 17,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 PROCEEDINGS

2 THE COURT: The record will reflect the
3 presence of the defendant, Mr. Ray, the attorneys.
4 And the jury is present.
5

6 Mr. Li, you may continue.

7 MR. LI: Thank you, Your Honor.

8 Good morning, ladies and gentlemen. I
9 could tell yesterday when I stopped my conversation
10 with you, a few of you thought thank goodness he's
11 done. Unfortunately I'm back. And, again, I've
12 got to tell you folks, we've been together for four
13 months. And I appreciate it. I really appreciate
14 your attention you've given me. I know how hard it
15 is. Middle of the day it's hard to listen to a lot
16 of facts come at you.

17 I know a few of you have made changes in
18 your plans, and it's summertime. So on behalf of
19 everybody here, we appreciate it.

20 Now, yesterday I started my conversation
21 with you. And there's something wrong with this
22 case. And I walked you through some of the things
23 that are wrong with this case. And I'm going to
24 walk you through a few more today. But the first
25 thing that we have to ground ourselves in again,
the same thing I talked about when I started this

1 conversation -- those two things, the truth and the
2 law.

3 So let me start with the law. I know I
4 mentioned this yesterday, but it bears reminding.
5 This book, the Constitution of Arizona and the
6 United States and all the laws in this book require
7 that the state must prove Mr. Ray -- not the
8 defendant -- Mr. Ray beyond a reasonable doubt
9 guilty of all charges, every element of every
10 charge, beyond a reasonable doubt.

11 And we talked yesterday about the
12 different standards -- you know -- what it takes to
13 get arrested, what it takes for MicroSoft to win a
14 billion dollars from Apple, what it takes to take
15 your kid from you if the state thinks you're not a
16 good parent, pull you off life support or
17 institutionalize you if the state thinks you can't
18 care for yourself or you're a danger to yourself
19 and others. Clear and convincing.

20 And then we talk about reasonable doubt.
21 I'm not saying all doubt. That's not what the
22 instruction says. Reasonable doubt. Right here.

23 So let's ground ourselves in that again.
24 Reasonable doubt. That's what the state has to
25 prove each and every element of the crime. And

1 that includes, as I said yesterday, whether or not
2 toxins didn't kill people. It's not our burden.
3 It's the state's. It's not Mr. Ray's burden as he
4 sits here in front of you on trial. It's not his
5 burden to come in here and prove to you by anything
6 that he's innocent.

7 So I'm going to challenge you that when
8 the prosecution gets back up and says where's the
9 evidence? Where's the evidence? Where's the
10 evidence, as the state did in the opening
11 statement, I'm going to challenge you to remember
12 that the Constitution, this book here, requires
13 that the state must prove guilt beyond a reasonable
14 doubt with its own evidence. Each element, each
15 element, beyond a reasonable doubt.

16 And this is in your instructions. If you
17 think there's a real possibility, a real
18 possibility, that Mr. Ray is not guilty, you must
19 give him the benefit of the doubt and find him not
20 guilty.

21 That's your instruction. That's
22 instruction F -- 4F at page 5. You have this back
23 there. So I'm not making this up. If you think
24 there's a real possibility the state just hasn't
25 gotten you all the way over to here, just a real

1 possibility the state hasn't gotten you here, you
2 must find -- you must give Mr. Ray the benefit of
3 the doubt and you must find him not guilty.

4 Real possibility. Not saying the defense
5 has to prove something. It's just is there a real
6 possibility the state with all it's theories about
7 conditioning people; about dehydration mattering,
8 not mattering; about you can just assume that all
9 these people were cooled off and that's why they
10 don't have an elevated body temperature even though
11 there is actually no evidence of that. You just
12 assume it. Even though Dr. Nell Wagoner, right
13 after the sweat lodge a doctor, not a dentist, a
14 doctor, put her hand right on Ms. Neuman and didn't
15 say she was kind of cold or cool or not hot. She
16 said very, very cool or cold. I'm sorry. Very,
17 very cold.

18 This is the state's witness, not a
19 defense witness. Not like the defense doctor that
20 we called. This is the state's own witness. And
21 she testified -- I think she might have testified
22 in March. Maybe you forgot about that. But that
23 was a long time ago. I'm here to remind you.
24 That's what a doctor testified.

25 So if there is a real possibility that

1 what Dr. Wagoner says over a month ago when she
2 touched Liz Neuman, that Liz Neuman was actually
3 very, very cold, then the state has not established
4 for sure beyond a reasonable doubt that there was
5 an elevated temperature. And the state -- there's
6 surely a real possibility that Liz Neuman did not
7 have an elevated temperature.

8 Surely there is a real possibility that
9 all of the assumptions that the state wants you to
10 make you can't make because they're not supported
11 by the evidence. Surely there is a real
12 possibility that the state hasn't gotten you here.
13 And when we talk about cooling, we can also talk
14 about Dustin Chambliss, who was -- he was the EMT
15 who treated. He was the EMT who treated Ms. Brown.
16 And you recall I showed you yesterday his
17 testimony. And he said that he was unaware of any
18 cooling done to Mr. Shore -- Ms. Neuman. I
19 apologize. Ms. Brown.

20 So we have Dustin Chambliss. He's the
21 EMT. That's what he's paid to do. Surely we have
22 a reasonable possibility that Mr. Shore and
23 Ms. Brown did not have an elevated temperature.
24 Surely. We have a reasonable possibility.

25 And then we had Greg Vanderhaar. He was

1 the other EMT. He treated Mr. Shore. And he
2 testified in front of you that he was unaware of
3 any cooling. Because they were on the other side,
4 and he's the guy who is right there on the spot.
5 Surely that creates a reasonable possibility that
6 the state hasn't shown you that these folks had an
7 elevated temperature.

8 And then we had Jennifer Haley. You
9 remember Jennifer Haley with her colorful figure.
10 She testified that she used two cups of water, two
11 cups of water. Splashed it and then handed
12 Ms. Neuman off.

13 Surely there is a reasonable possibility
14 that two cups of water does not cool somebody's
15 elevated body temperature from 105 or 104 to 99.
16 Two cups of water. I did mention Nell Wagoner.
17 She's a doctor. She's not guessing. She's a
18 doctor. She puts her hand on Ms. Neuman and says
19 she's very, very cold.

20 Surely we are in -- there is a reasonable
21 possibility that these various witnesses are
22 telling you what happened. Surely. That's the
23 evidence. You heard from the state. State made a
24 suggestion, you know what, you can infer. You can
25 just infer. What does "infer" mean? In this

1 context? "Infer" means guess. Infer in this
2 context means, you know what. Forget it. Don't
3 pay any attention to that. You're not allowed to
4 do that. Surely, surely, surely there is a
5 reasonable possibility.

6 Now, you also heard from Dr. Dickson, who
7 the state says is the man you have to listen to.
8 He's the guy. You don't need to listen to that.
9 You don't need to listen to other things. He's the
10 man you need to listen to.

11 And he told you, and so whatever the
12 conclusions or opinions, the state's medical
13 examiners, the people paid for by your tax dollars,
14 have reached regarding the cause of death, you
15 would defer to them since they are the state's
16 medical examiners in this case; correct? Or yes.

17 Answer: Yes.

18 Well, you recall Dr. Lyon. I've got --
19 you recall Dr. Lyon. He said that his conclusion
20 was -- question: 51/49 percent?

21 Answer: Correct.

22 51/49 percent. Now we're here.

23 So as you sit here, Dr. Lyon, can you
24 tell the jury whether you believe the cause of
25 death in this case is heat stroke beyond a medical

1 degree -- reasonable medical degree of certainty?

2 Answer: No.

3 So we're now here. 51/49. Surely we are
4 now -- there is a real possibility that the state
5 has not proven to you with its own evidence beyond
6 a reasonable doubt -- this is their own evidence,
7 their doctor. Surely they have not proven to you
8 beyond a reasonable doubt with their own evidence
9 that Mr. Ray is guilty, that these folks died of
10 heat stroke. Surely there is a reasonable
11 possibility.

12 But we're not done. And this is the
13 other medical examiner. And you'll recall that
14 Dr. Dickson said that he would defer to the medical
15 examiners. You recall that. Because they're the
16 guys who are paid to do medical examinations and
17 determine cause and manner of death, not him. They
18 are.

19 What you are telling this jury today is
20 that based on the evidence, based on your
21 reevaluation of the evidence -- and remember the
22 reevaluation was because he had looked at
23 Dr. Paul's report. Based on the reevaluation of
24 the evidence, do you believe that toxicity was --
25 you do affirmatively believe that toxicity is at

1 play; correct?

2 Answer: Correct.

3 This is the state's own evidence.

4 Question: The toxicity that could be in
5 place based on the signs and symptoms is
6 organophosphates; correct?

7 Answer: That is among the toxicities
8 that are possible. State's own evidence.
9 Dr. Mosley right here. You could put them all the
10 way down here if you wanted. He's not saying heat
11 stroke. You can probably put him all the way down
12 here. He's saying toxicity. State's own evidence.
13 That's the rule.

14 State's got to prove something to you.
15 That's how our system works. That's how you want
16 it. You want to sit here, and if something happens
17 to you or a friend or your child, anybody you know,
18 you don't want to have this person sit in Mr. Ray's
19 chair and be demanded to prove I got to show you
20 something different. I'm not a doctor. I got to
21 go find all these records and prove something to
22 you. That's not how our system works.

23 The government has all the power.
24 They've got the police. They've got the department
25 of -- they got DPS. They got the prosecutor's

1 office. They got the doctors. They got everybody.
 2 So that's why the government -- that's why the law
 3 demands that the state prove beyond a reasonable
 4 doubt with its own evidence, the state's evidence.
 5 And here's what you're seeing. This is the state's
 6 evidence right here.

7 Then you have Dr. Cutshall, who said he
 8 could not rule out -- I apologize. So then
 9 Dr. Dickson also mentioned -- and so if that doctor
 10 in the ICU who you believe would have the most
 11 information available, you would defer to his
 12 opinion about the patient he treated; correct?

13 Answer: Yes.

14 So what did Dr. Cutshall say?
 15 Dr. Cutshall. He said:

16 Question: Now, given all these
 17 indications, Doctor, as you sit here before this
 18 jury, can you tell them that you rule out
 19 organophosphates?

20 Answer: I can't say that I can rule that
 21 out with certainty. No. I'm not sure exactly
 22 where to put this piece of the state's evidence.
 23 We can put it here. We can put it up here,
 24 wherever you want to put it. He just can't rule it
 25 out. Okay.

1 So I'll cut the -- I'll put it here just
 2 because he's not saying 51/49 percent. He's not
 3 saying like Dr. Mosley, I think it is toxins.
 4 Okay? He's saying I can't rule it out. Signs and
 5 symptoms are consistent with organophosphates.

6 So he's somewhere -- you know -- around
 7 here. I don't know. You can decide for
 8 yourselves. But he sure is not over here. He's
 9 not saying oh, you know what. It's clear and
 10 convincing. I'll pull the plug on a patient. He's
 11 not saying it's clear and convincing. I know I can
 12 take this kid away from his family or
 13 institutionalize one of you. He's not saying I
 14 know, I know, so I can pull the plug on a patient.
 15 That's not what he's saying.

16 He's saying -- you know -- I can't rule
 17 it out. Is there a real possibility? Is there a
 18 real possibility? Oh. Sorry. I forgot. This is
 19 the state's own medical doctor. This is the one
 20 that they want you to believe every word he says.

21 He says there are signs and symptoms that
 22 can be consistent with -- we agreed with this
 23 yesterday. There are signs and symptoms, and we
 24 did a whole list of heat illnesses and
 25 organophosphates. There are overlap absolutely of

1 the symptoms.

2 So this is the state's doctor. This is
 3 the quote that the state didn't want to mention to
 4 you, which is that he says, yeah. Actually, they
 5 are overlapping. Now, I don't know where to put
 6 him. Okay. I don't know exactly where to put him.

7 But he's saying to you that yeah. You
 8 know what. There are signs and symptoms that
 9 overlap. There are signs and symptoms that
 10 overlap. Let's put him here. He's a pretty
 11 aggressive guy. We'll put him here.

12 So what does this all tell you? This is
 13 what the state's own witnesses are telling you.
 14 And I'm trying to be as fair as I can about where
 15 to put each of these witnesses, on the far. And
 16 maybe Ms. Polk thinks they should be put somewhere
 17 else.

18 But I'm going to tell you, every single
 19 one of these, starting with Dr. Mosley, who
 20 actually thinks it's toxins and did the autopsy on
 21 Ms. Neuman and who did actually tell us all under
 22 oath that he thinks -- I got questions about my
 23 original diagnosis. He's all the way down there.

24 And then you got Dr. Lyon. He says he
 25 can't rule out organophosphates. And he sure would

1 have tested for them if someone had told him. But
 2 he's 51/49 given what he knows right now. I'm
 3 going to put him right here. These folks,
 4 Dr. Cutshall. I'm not sure where to put him.

5 Dr. Nell Wagoner. I just note these
 6 folks to show you that the elevated temperature,
 7 the whole theory that the state wants you to assume
 8 is true that folks were cooled off is just -- you
 9 can assume anything you want. But you can't assume
 10 it all the way beyond a reasonable doubt when the
 11 evidence doesn't get you there. You cannot do
 12 that.

13 But then that's not all. We got a lot of
 14 state's evidence here. We got all the medical
 15 records. These are all medical records that we
 16 went through in gruesome detail, page after page.
 17 And these medical records -- I'm not going to tell
 18 you that these medical records don't mention heat.
 19 Some do. Okay? They do.

20 But some and many say, as I've pointed
 21 out to you yesterday, hey. You know what. There
 22 might be a toxidrome at work. There might be some
 23 kind of toxicity at work. And there are some
 24 records in here, Stephen Ray's, for instance, that
 25 say hey. You know what. Not heat stroke. Okay.

1 Affirmatively not heat stroke.

2 Let's just put these guys -- and I'm just
3 ballparking this. You can decide for yourselves
4 where these things should go. That's your call.
5 I'm just the lawyer. I'm just here trying to walk
6 you through some of this. But you can decide where
7 that needs to go. But I'll submit to you it surely
8 doesn't get you over here. It does not get you
9 past the real possibility that the state has failed
10 to carry its burden.

11 Let's talk about Stephen Ray's medical
12 records. Stephen Ray's medical records, which were
13 received or sent on February 1, 2011, 15 days
14 before the first one of you folks showed up to be
15 selected as jurors, 15 days, a year after Mr. Ray
16 was indicted.

17 And the request sent to the Yavapai
18 County Attorney's Office -- the request came on
19 January 31, the day after Mr. Paul -- Dr. Paul was
20 interviewed. So they didn't even bother requesting
21 this form -- these forms, I don't know how many
22 hundreds of pages of forms, medical records, until
23 after -- a year after Mr. Ray was indicted and only
24 at the prompting of the defense doctor, the medical
25 examiner from New Mexico.

1 This is the document that says two
2 doctors saying heat stroke not involved. We don't
3 think this patient, who is in the exact same sweat
4 lodge, who suffered a coma, exact same patient,
5 exact same sweat lodge -- we don't think he had
6 heat stroke. The patient does not appear to have
7 had heat stroke. We're way over here.

8 Then we've got the organophosphates tape
9 that you heard. No disrespect to the state, but
10 I'll submit to you they're playing games with you
11 telling you we don't know if it's an EMT. I'll
12 submit that that's just -- that's not befitting of
13 this courtroom. It is an EMT. We have a witness
14 who told you it was an EMT. So let's not play
15 games with that.

16 And the EMT says he thinks there might be
17 organophosphates. I'm not saying he said there is.
18 I'm not saying he said I tested people's blood, and
19 I've determined there is organophosphates. But
20 this is on the night of the accident, and an EMT
21 comes out and says, hey. We think there might be
22 organophosphates.

23 You put this wherever you want to put it.
24 But I'll tell you something. If you think that the
25 state's own evidence says that we think there might

1 be organophosphates proves beyond a reasonable
2 doubt that there was not organophosphates but
3 actually was heat stroke, if an EMT guy shows up
4 and says, it might be organophosphates, and that
5 somehow the state has now with this piece of
6 evidence proved that it isn't organophosphates or
7 that it was heat, I'd submit that you're not
8 thinking about this straight.

9 I mean, this is a tape where a guy says,
10 I think there might have been poisons involved.

11 So wherever you want to put it, it sure
12 is not over there. I'd submit somewhere around
13 here with all the other medical records where
14 people are saying hey, look. It was heat. There
15 was problems. There might be some toxins. We
16 don't know.

17 But we're not done. We're not done.
18 I'll get to this a little later. These are the
19 tarps. You remember the tarps? One tested
20 positive for 2-ethyl-1-hexanol. One tested not
21 positive for 2-ethyl-1-hexanol. So the state wants
22 you to say it's plastics. It's obviously plastics.
23 These are the only two samples. It's obviously
24 plastics. It can't be in a marker for pesticides
25 even though the EPA says it is a marker for

1 pesticides. It can't be. We know. It's obvious.

2 Well, it isn't obvious. These are the
3 same sweat lodge; right? We've heard again and
4 again from the state how all the stuff is exactly
5 the same. It's exactly the same. Why is it that
6 one tests positive for 2-ethyl-1-hexanol and the
7 other doesn't?

8 And does the existence of
9 2-ethyl-1-hexanol -- you get it over here now?
10 This is the state's own evidence. Remember the
11 state's got to prove it beyond a reasonable doubt
12 with its own evidence. Does the state -- because
13 there is 2-ethyl-1-hexanol in that sample there,
14 does that get you to beyond a reasonable doubt that
15 Mr. Ray killed the folks through this
16 heat-endurance challenge? No.

17 What it suggests is hey. There might
18 have been something else at work. Might have been
19 something else at work. We don't know. Okay.
20 State never tested the blood that would tell us.
21 It's now useless so we'll never know.

22 But as that instruction says, and I'll
23 talk to you about this in a bit, you cannot hold
24 that against Mr. Ray. Can you imagine if this
25 happened to you? Forget about sweat lodges.

1 Imagine this is just a room you rented and all of
2 these signs were showing up, signs and symptoms
3 were showing up. You had all these doctors saying
4 all of these things. Might be toxins. Might be
5 toxins.

6 And then what happens is instead of
7 testing the blood of the decedents, they just
8 ignored or didn't hear it or didn't even look at
9 it. And then a year and a half later, one of you
10 or your family or anybody sitting in trial, your
11 child sitting in trial, and the state's saying to
12 you, can't prove it. You can't prove that it was
13 toxins even with all this stuff. You can't prove
14 it.

15 That's not how our system -- that's like
16 my aircraft carrier example. You can't put -- you
17 just can't put anybody in charge of landing a plane
18 on an aircraft carrier. You know. Whoever does
19 that is not a guy or a woman who says whatever,
20 we'll just wing this. We'll get it close, close
21 enough.

22 Person's going to land that \$130 million
23 F18 on a \$2 billion aircraft carrier is going to be
24 someone who takes that job real seriously and
25 really precise, not going to fudge. He's not going

1 to say oh. Assume something. I'm going to assume
2 I'm on the right flight path. No. There is a lot
3 of training, diligence and effort that goes into
4 that, on that landing.

5 We're crashing this plane. The state is
6 just driving this plane into the back of an
7 aircraft carrier and just destroying it, just
8 destroying it. That's what this is telling you.

9 So, ladies and gentlemen, if there is a
10 real possibility, a real possibility, that some of
11 this might suggest to you that the state does --
12 has not landed the plane on the aircraft carrier,
13 there is a real possibility that the state is off
14 it's flight path, there is a real possibility that
15 they're not over here -- but even if they're here,
16 if you're a foot low landing a plane on an aircraft
17 carrier, one foot low, game over. If you're one
18 foot low, game over.

19 So if there is a real possibility that
20 this evidence takes you away, then that blue book,
21 there is a real possibility, you must acquit. You
22 must give Mr. Ray the benefit of the doubt and find
23 him not guilty. And that's the law.

24 Now, I'm going to address something right
25 now, because the state may come back here and tell

1 you -- and if they do, I want you to really -- I
2 want you to really push back hard on this one.
3 Because if the state comes back and says you know
4 what. It doesn't matter if it was
5 organophosphates. Just doesn't matter. We don't
6 have to prove that it was organophosphates or
7 wasn't organophosphates. Who cares. You know.
8 Mr. Ray's had a sweat lodge ceremony. People died.
9 He's guilty.

10 If they come back with that, I want you
11 to remember this. That's not what the law is.
12 Okay? And I want you -- there is a lot of
13 technical reasons why that's not true. They're not
14 even that technical. But there's a lot of reasons
15 why that's not true and you can't even argue that.
16 But there are a lot of reasons why just from common
17 sense you can't accept that.

18 And I'll just go back to the example of
19 the hotel room. You rent a hotel room, and you do
20 crazy things in there -- do back flips and throw
21 each other around, do kung fu fighting, whatever,
22 stuff like that. And somebody dies of
23 organophosphates poisoning in there. But you don't
24 know anything about it.

25 This is the Ramada Inn or the Prescott

1 Country Club, something like that. And somebody by
2 accident -- nobody's -- they're not criminals.
3 Somebody by accident has put some toxin in there by
4 accident. Maybe they hired somebody not really
5 thinking about his job. He's not a very good
6 worker, whatever. Okay. Not a criminal. Just
7 somebody makes a mistake.

8 You, the person who hired that hall, you
9 didn't cause those folks to die. The
10 organophosphates or the unfortunate accident that
11 we're talking about caused folks to die. And
12 that's what the law provides.

13 If you look at instruction No. 7, which
14 you have, that's the part where they talk about
15 causation. One of the elements that you have to
16 find beyond a reasonable doubt is that Mr. Ray
17 caused people to die, that he caused them to die.

18 And so then later on you have to read
19 instruction 7, what it is that constitutes
20 causation. And it's but for the conduct, the
21 result in question would not have occurred. Okay?
22 So, technically, if you're the person who rents the
23 hall, the Prescott Country Club dining room and you
24 want to have your kung fu derby in there,
25 technically, I guess, if you hadn't rented the

1 hall, maybe these people wouldn't have been here
2 and maybe they wouldn't have died. Okay?

3 So technically maybe the but for
4 causation has been established. But that's not --
5 you all use your common sense. That's not how the
6 law works. There is more. The relationship --
7 there has to be a relationship. You have to act
8 recklessly and all those things. I'll get to that
9 in a second.

10 Then there is this concept of proximate
11 cause. It's just a legal concept. Proximate cause
12 means legal cause. And what that says is there has
13 to be a natural and continuous sequence which
14 produced a death, without which the death would not
15 have occurred.

16 So taking the example of the kung fu
17 derby in the Prescott Country Club, it's not a
18 natural sequence of events that guys doing this
19 will end up being poisoned. That's not a natural
20 sequence.

21 The bolder example that Ms. Polk --
22 that's exactly what we're talking about. It's the
23 same thing. It's not a natural sequence of events
24 to be sitting in a tent and have a boulder come
25 rolling out of the cliff and crush you. That's not

1 a natural sequence of events. Just like the kung
2 fu in the Prescott Country Club and the poisons and
3 just like, frankly, ladies and gentlemen, the
4 potential of toxins in a sweat lodge. That's not a
5 natural sequence of events.

6 And you know what. The law goes even
7 further. And it says is broken -- proximate cause
8 does not exist if the natural chain of events,
9 quote, is broken by a superseding, intervening
10 event that was unforeseeable by the defendant and
11 with the benefit of hindsight may be described as
12 abnormal and extraordinary. That's what we're
13 talking about.

14 If the cause, if the natural sequence of
15 events is broken by an unforeseeable thing,
16 something that's abnormal, with benefit of
17 hindsight or extraordinary.

18 But, you know, organophosphates. That's
19 abnormal and extraordinary. That is not something
20 that anybody anticipates when you rent a sweat
21 lodge for two and a half hours out of 365 days.
22 It's not yours. You didn't build it. You didn't
23 maintain it. You didn't control it. You didn't
24 maintain the grounds. You didn't do any of that.
25 You just rented it for two and a half hours.

1 And if the state says well, you should
2 have inspected it. Really? Really? If you rented
3 the Prescott Country Club dining hall for a kung fu
4 match, are you going to walk in there with what
5 they call a "Drager tube"? I talked about it with
6 Detective -- Sergeant Barbaro.

7 A Drager tube is what they use in the
8 military or industrial situations where you have a
9 really good forensic device that tests as to
10 whether there is organophosphates. And you
11 actually have to look for organophosphates. It's
12 not something that you can just say -- use that
13 four-gas detector and walk -- no. You have to have
14 a specialized tool to look for it.

15 So is it the responsibility of any of you
16 to rent a wedding hall for your kids or grandkids
17 or whatever, to rent a wedding hall, that you got
18 to go in there with a Drager tube, make sure there
19 isn't any toxins? You got to find out if there is
20 Legionnaire's disease or any other disease before
21 your guests come in?

22 So if the state says to you, don't worry
23 about it. Even if it is organophosphates, don't
24 worry about it. We've proven, Mr. Ray is liable.
25 He should have done this. He should have done

1 that. That's not the law. That's not the law.

2 The state has to prove beyond a
3 reasonable doubt that the superseding, intervening
4 event did not cause the deaths. Okay. The state
5 has to prove beyond a reasonable doubt that oh.
6 Organophosphates was foreseeable, of course, beyond
7 a reasonable doubt. Or beyond a reasonable doubt
8 it is the natural consequence of having a sweat
9 lodge ceremony that people will be poisoned by
10 organophosphates or some other toxin. Beyond a
11 reasonable doubt.

12 State is nowhere near that. I mean, I
13 would submit on this issue, the state is all the
14 way over here. How could anybody have anticipated
15 this? And the sad thing is if the state makes this
16 argument, the sad thing would be that they're
17 saying that Mr. Ray should have known beyond a
18 reasonable doubt he should have foreseen what all
19 these doctors here still don't know. Okay. Got
20 that? That he should have foreseen something that
21 Dr. Lyon can't even rule out or that Dr. Mosley
22 after reviewing reports and reading Dr. Paul's
23 report, now Dr. Mosley thinks is it might have been
24 a toxin.

25 Mr. Ray should have foreseen that all

1 these medical records and all this testing and all
2 this stuff the state did and didn't do, all this
3 evidence, the state's evidence, he should have
4 foreseen that. He should have figured that out.

5 If the state makes that argument, you
6 need to reject it right on the spot. You need to
7 look the state right in the face and say that's not
8 going to fly here because that's not how our laws
9 work.

10 And I want to mention something to you as
11 you look at this. You see Dr. Paul anywhere? Is
12 Dr. Paul anywhere here? This is the state's own
13 evidence. The state's got to prove with its own
14 evidence beyond a reasonable doubt. So it's not a
15 battle between Dr. Paul, the evil defense doctor,
16 and Dr. Dickson, the doctor who knows everything.
17 It's not a battle between those two guys.

18 I'll submit if it was a battle, Dr. Paul
19 wins. Okay? That's just me. You guys are the
20 jurors. You can decide. I haven't put Dr. Paul
21 out here at all. I'd submit if you put Dr. Paul
22 out here, all of this, all of this -- I'd submit
23 you put Dr. Paul into the balance, all of this.
24 I'd suggest to you that if you put Dr. Paul into
25 the mix, we're way over here. That whole thing I

1 did, that was the state's evidence.

2 If you want to consider Dr. Paul, we're
3 over here. We don't know. The state didn't ask.
4 So let's get to that. Let's talk about what the
5 state did and didn't do. Here's what's state says
6 in response to that: The state says, you know
7 what. Can't be OP. Cannot be organophosphates.
8 There is no way it's organophosphates despite this
9 tape here where a trained medical person says there
10 might be organophosphates, despite all the
11 evidence, despite all the testimony you've heard
12 people saying they can't rule out. It can't be
13 organophosphates because they're really rare. It
14 never happened.

15 Between 1998 and 2002 the American
16 Association of Poison Control Centers recorded over
17 55,000 exposures to organophosphates and 25,000
18 exposures to carbamates, similar insecticides.
19 These are cases where people actually figured out
20 that it was organophosphates as opposed to
21 misdiagnosing it as heat stroke or something else.
22 That's not rare.

23 Then the state says well -- you know --
24 they're not very dangerous. I think you heard
25 Ms. Polk say something about how pesticides -- you

1 don't need to worry about. I actually wrote down
2 Dr. Paul saying, organophosphates are not
3 dangerous. Here's what that same report -- it's a
4 textbook. Here's what it says: These insecticides
5 still rank as the most frequent lethal, lethal,
6 insecticides in use in the United States and among
7 the most lethal poisons.

8 I'd suggest if Dr. Dickson really thinks
9 that -- you know -- you don't need to worry about
10 some organophosphates, I'd suggest that he go to
11 Home Depot, go buy some household ant killer that
12 has 50 percent organophosphates in it, get himself
13 really, really hot inside a sweat lodge, get
14 himself really, really sweaty and just pour it over
15 his stomach and see what happens. See if his
16 Wikipedia research to you about the lethal dosage
17 of one organophosphate versus another. See if
18 that -- see if he's willing to go that far.

19 And the other argument they make, there
20 is another quote from that very text, which isn't
21 here, but I'll read it to you. Children and adults
22 can develop toxicity while playing or inhabiting a
23 residence recently sprayed with organophosphate
24 insecticides by a pesticide applicator. Direct
25 dermal contact with certain types of these

1 insecticides may be rapidly poisonous, rapidly
2 poisonous.

3 And here's the problem: Because the
4 state didn't actually go into the tool shed or the
5 pump house or look at anything to find out maybe
6 there was some insecticide there, we don't know
7 what insecticide you would have to look for. There
8 are literally thousands of them out there.

9 And if you're going to do a chemical
10 analysis afterwards -- remember Dawn Sy? She said
11 there's a -- that complicated machine? There is a
12 very specific chemical signature for something.
13 Every single chemical has a very specific chemical
14 signature.

15 You've got to know what you're looking
16 for. And she's telling you she can't find it
17 because she doesn't know what you're looking for.
18 You would have to get thousands of samples and
19 figure out what you're looking at. But because the
20 state didn't bother to do that, we don't know. We
21 don't know.

22 But it is true that direct dermal contact
23 with certain types of these insecticides can be
24 rapidly poisonous. And it is poisonous. And it is
25 still true that these still rank as the most

1 frequent lethal insecticides in use in the
 2 United States.
 3 And you recall Mr. Hughes asking
 4 Dr. Paul, hey, are you sure this isn't in India?
 5 You're sure we're not talking about some other
 6 countries outside -- we're talking about the United
 7 States. That's what it says. United States. Not
 8 India, not somewhere else. The United States.
 9 Okay?

10 Well, here's the other position that the
 11 state has taken: You know what. Not only are
 12 pesticides -- organophosphate pesticides rare and
 13 not very dangerous, which is not true, either one,
 14 but they're not in Angel Valley. They're just not
 15 at Angel Valley.

16 Well, you know what. If there is one
 17 thing this case has shown you, if there is one
 18 thing this case has shown you, they didn't look.
 19 That's the one thing this case has shown you. They
 20 sure did not look for any.

21 So I'm going to walk you through a time
 22 line of this entire investigation. And you've
 23 already heard a lot of it before, so I'll try to be
 24 quick with it. But just going to show you three
 25 things. It's going to show you, one, that the

1 government repeatedly ignored the possibility that
 2 toxins were involved. It's going to show you that
 3 as a result they never looked for them, and they
 4 didn't care. Remember Dawn Sy, the criminalist?
 5 She never even got talked to. They didn't care.

6 And the third thing it's going to show
 7 you is that in the middle of trial or days before
 8 trial began, when they realized, oh my gosh, there
 9 is this tape that says organophosphates, oh my
 10 gosh. We should have looked at these medical
 11 records. There's all kind of stuff in here about
 12 toxicity. Oh, my gosh. Oh, my gosh. We should
 13 have looked at the 2-ethyl-1-hexanol. Should have
 14 looked -- oh, my gosh.

15 Then they do what I call "backfilling."
 16 Then in the middle of the trial, you see them start
 17 to backfill. And we'll get to that. But the first
 18 thing they backfilled is testing 17 months too late
 19 of the organophosphates.

20 The second thing they started backfilling
 21 in is the good folks at Angel Valley, guys who come
 22 in here and tell you they never, ever, ever, ever,
 23 ever use pesticides because that's against their
 24 philosophy, except the few times they used
 25 pesticides. Every other time they don't. We'll

1 talk about that.

2 Before I go to this, I just want to tell
 3 you, this is not me or Tom or Truc. This is not
 4 any of us picking on Detective Diskin. That's not
 5 the intention of this. We're not picking on
 6 Detective Diskin. Because this is just the law. I
 7 don't make these rules. This is the law.

8 If you find -- this is your instruction.
 9 This instruction 3 -- excuse me -- instruction 4D,
 10 instruction 4D. If you find that the state has
 11 lost or destroyed or failed to preserve evidence
 12 whose contents or quality are important to the
 13 issues of this case, you should weigh the
 14 explanation, if any, given for the loss or
 15 unavailability of the evidence.

16 If you find that such an explanation is
 17 inadequate, then you may draw a negative -- sorry.
 18 You may draw an inference unfavorable to the state,
 19 which in and of itself, that inference in and of
 20 itself, may create a reasonable doubt as to the
 21 defendant's guilt. In and of itself. That's
 22 the law.

23 So let's go to this chart. On the night
 24 of the accident -- we've gone over this a lot.
 25 When you see it in context, it will help. On the

1 night of the accident, the EMT comes in and
 2 suspects organophosphates. That's Exhibit 742
 3 right there. Ted Mercer says, I think it's the
 4 wood, you know.

5 So here's the organophosphates. We're
 6 not exactly sure. Could have been some carbon
 7 monoxide with maybe some organophosphates that were
 8 mixed in somehow. We're checking into that.

9 Then you have Mr. Mercer on the night of
 10 the accident in the hospital. He's asked, what do
 11 you think is different, and he gives the following
 12 answer:

13 (Audio played.)

14 MR. LI: That's without hesitation. I think
 15 it's the wood. I'm not saying I know that it is
 16 the wood. I'm just saying that here's a clue that
 17 pops up in this investigation. I think it was the
 18 wood.

19 The ER doctors, as you've seen throughout
 20 those records, suspect toxidromes. That is toxins.
 21 The next day the same ER doctors are saying -- who
 22 are treating patients who have been held
 23 overnight -- are still writing things like I don't
 24 think it was heat stroke. There might have been a
 25 toxidrome involved, all those sorts of things.

1 And Ted Mercer, again, says, and you
2 heard it, I think it's the wood. And remember
3 there was this big wood pile here. And the state
4 collected that piece, that piece, and that piece
5 and that's it. Those are those exhibits over here.
6 And that's it. They didn't collect any of this.

7 And on that tape you may have recalled
8 hearing Detective Diskin say literally, there is a
9 piece of treated wood. And remember how the
10 Hamiltons told you we don't ever have any treated
11 wood in our property. And on that tape you hear
12 Detective Diskin say there is some treated wood.

13 Again, I'm not saying I know it's the
14 wood. Here's a clue. You can follow it if you
15 want. If you're the government, maybe you should.
16 And maybe you can rule it out or maybe you can rule
17 it in. But maybe you ought to follow it.

18 And then this is where Ted Mercer says
19 well, there is some rats around there, and I saw
20 some rat poison on the ground. There were some
21 chunks of rat poison. But -- you know -- that's
22 been there. There has been rats in there, and we
23 put poisons in there, rat poison, in with the
24 tarps -- chunks of rat poison.

25 That's a clue. This is where the tarps

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1 are being stored. If you're actually suspecting
2 toxicity, which Detective Diskin on the stand said
3 he was -- if you're actually suspecting toxicity,
4 maybe you ought to go into the shed where the guy
5 just told you we put poison on things.

6 You know, maybe you ought to say oh,
7 really? Did you just put rat poison? How about
8 ant poison? How about organophosphates? Did you
9 ever spray it with anything to make sure?

10 I mean, there are bugs everywhere. I saw
11 a centipede yesterday -- not yesterday -- a few
12 days ago in my bathroom that was literally this big
13 and bright yellow and orange. There are big bugs
14 everywhere outside. Every time I walk out there,
15 I'm seeing ants and bugs. And I saw four ants
16 carrying off a little gold fish that some kid
17 probably dropped on there just over last Friday. I
18 just saw big old ants hauling him off. Okay.

19 So maybe you might think if somebody is
20 telling you hey, you know what. I put poison on
21 this. Or people put poison this stuff here -- I
22 know it's for rats. But maybe you might think,
23 hey. I'm going to go in there and take a look, see
24 if there is any poison in there. There might be.
25 And maybe we can test it and figure out. This is

1 the day after the accident.

2 So the day after the accident, the state
3 collects some evidence. They don't go in the shed,
4 by the way. They do collect some evidence but not
5 in the shed. And there is two sheds, by the way.
6 There is the pump house, and then there is the -- I
7 think they called it the "storage shed."

8 So this is Exhibit 895. And there is
9 four of these. Okay? This is about one cubic inch
10 of dirt. So they collect four cubic inches -- I'm
11 guessing. Maybe four cubic inches of dirt that
12 they collect.

13 And you remember I had the guy, the
14 computer programmer guy, with the -- calculates
15 distances and what have you. And I had him
16 calculate out what's the percentage of dirt that
17 this is, the four cubic inches, of a 23-foot
18 diameter sweat lodge.

19 And he said it was less than -- well,
20 certainly 99.99999 percent of the dirt was not
21 collected. Okay. So -- not collected. This is
22 what we have.

23 And then we collected -- they collected
24 four of those tarp samples, 10-by-10 inch squares.
25 And you saw the state have Mr. Hamilton, of all

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1 people, walk each one by you and show you each
2 sheet. You probably recall that. That's what they
3 collected, four 10-by-10. And that's probably less
4 than 1 percent of the entire area of the sweat
5 lodge. So that's all they collected. And then, of
6 course, as I said, they collected four cubic inches
7 of dirt.

8 You know what. They could have collected
9 a whole dump truck worth of the dirt. They could
10 have collected every single inch of dirt. Because
11 they never actually tested it. So even if
12 .00001 percent of the sweat lodge area is actually
13 useful to determine something like were there
14 poisons -- even and that is, and I'll tell you it
15 isn't. It isn't. But even if it was, it doesn't
16 matter. They never tested it. They didn't care.

17 So what happens next? So they collect
18 all this stuff. And then the Hamiltons say we want
19 to have a cleansing ceremony. We would like to
20 destroy the site. We know people have died here.
21 We know that there is toxic issues at stake, there
22 is all this kind of stuff going on. But we'd like
23 to just get rid of it all.

24 What does -- what do the police say -- by
25 the way? With the help of the Mercers and

1 Mr. Rock, who we'll get to. Mr. Rock is there too.
2 We'd like to get rid of it. And less than 48 hours
3 after this tragedy occurs.

4 So what does Detective Diskin tell them?
5 And you will recall this is Detective Diskin's
6 first homicide case as the case agent. And I mean
7 no disrespect to Detective Diskin. But this is his
8 first homicide case as lead case agent.

9 He's the guy -- this is his first trip in
10 the -- on that plane as the pilot landing that
11 plane on that pitching deck of the aircraft. First
12 maiden voyage. What does he tell the Hamiltons?
13 He says okay. And so okay.

14 So there is Mr. Rock. There is
15 Mr. Hamilton. So they tear it apart. There are
16 the Hamiltons. They burn the woods. There is
17 actually a tobacco pouch in there getting burned
18 up. There is Mr. Hamilton cutting up the tarps.
19 There he is cutting them up some more. And then
20 they rake the ground. Less than 48 hours after the
21 accident.

22 The scene that the state wants to call
23 the "crime scene," the crime scene is gone. And
24 this is what we have right here.

25 Meanwhile Diskin -- Detective Diskin asks

1 the DPS, Dawn Sy, hey, can you guys check for toxic
2 volatiles? And then on the 21st the sheriff's
3 department asks about the wood. Hey, can we find
4 out about the wood that was used? I'm sorry. Dawn
5 Sy, the criminalist, the CSI person, says hey, can
6 you tell us about the wood that was used in the
7 fire to heat the rocks? Wood might be from a log
8 cabin. And she said to you it might be treated.

9 We only have four logs now. We don't
10 have all the other logs that have been carted away
11 by Mr. Hamilton to be sold, as he says.

12 And then on the 29th, Dawn Sy says hey,
13 can we test the soil that was under the folks who
14 passed away? Can we test it? Or she was asked can
15 you test it. Yeah. If you get some control
16 samples. We're only talking about four cubic
17 inches.

18 And so on the 30th the sheriffs went out
19 and collected some more soil. This is after the
20 scene has been raked and destroyed. So it's not
21 very useful when you're collecting stuff after the
22 fact.

23 So then on the 3rd, Dawn Sy was asked
24 again, did the wood have any markings on it that
25 would indicate it's pressure treated? They're

1 clearly wondering about this. Okay? But now the
2 wood is gone. You have four logs that are probably
3 not pressure treated. I mean, they don't look
4 pressure treated to me. They don't look pressure
5 treated to Detective Diskin. I'll agree with that.
6 They don't look pressure treated. Usually pressure
7 treated is green. And then if it sits out long
8 enough, it turns regular color. Usually it's
9 green.

10 So she asks. The logs are gone.
11 Everything is gone. You know what. I forgot. One
12 critical thing is if you wanted to test for
13 organophosphates in the blood, you probably should
14 have done it somewhere around here, that first
15 week. That was never done.

16 So then months go by. Months go by. And
17 instead of spending those months looking at this,
18 this stuff, what they decide to do is they're going
19 to have a meeting on the 14th.

20 You know what. And I forgot another
21 thing. I am so sorry. We have all this stuff
22 going on here. Clear the site. And on
23 October 26, 2009, this day, Detective Diskin tells
24 the Hamiltons we're not -- you're not in any kind
25 of trouble criminally. We're not investigating you

1 or your husband.

2 And I want to be clear on this point. I
3 frankly don't care. I'm not saying they should
4 investigate criminally the Hamiltons. This is an
5 accident. Okay? I just want to make that clear.
6 But as of this, we're talking about a couple weeks
7 into this accident, there's no possibility that the
8 Hamiltons are involved or have any issue at all.

9 So then we get to the 14th of December.
10 And nothing happens, but we get there. We have a
11 special meeting. You heard about this meeting.
12 This is with the county attorney, some of her
13 deputies, the sheriffs. This is with the medical
14 examiners. And this is to get everybody, quote,
15 unquote, on the same page. Everybody's got to get
16 on the same page.

17 The ER doctors are not called. Stacks of
18 medical records from the ER doctors -- you don't
19 call them in and circle up and have everybody tell
20 what we did and what we saw. And we don't -- we
21 don't have a tape being played about
22 organophosphates. We don't have the criminalist,
23 Dawn Sy, who has been asked all these questions.
24 Can you do this investigation into some things?
25 Can you look into some stuff? She's not there.

1 What we have is a medical examiner and
2 the police and the prosecutors getting on the same
3 page. And what we have is Detective Diskin telling
4 them certain facts as he sees them. Okay?

5 And here's what happens: When we try to
6 find out about it -- "we," meaning Ms. Do and I --
7 the state tells the medical examiners not to answer
8 the questions. So here's what Dr. Lyon said on the
9 stand:

10 Question: Okay. And do you remember at
11 each of those times when I tried to ask you those
12 questions, Mr. Hughes objected and instructed you
13 not to answer?

14 Answer: Yes.

15 Question: In your 11 years as a medical
16 examiner, have you ever been instructed by a
17 prosecutor not to answer questions about your
18 investigations?

19 Answer: No.

20 Question: Now, I understand you're not a
21 lawyer. And so perhaps you didn't really know what
22 to do. But you felt compelled to follow
23 Mr. Hughes's instructions; correct?

24 Answer: Correct.

25 And so you refused to answer the

1 questions?

2 Answer: Correct.

3 Question: And a second interview was
4 ordered in order for us to ask you those questions?

5 Answer: Correct.

6 Question: And the questions I asked or
7 tried to ask then are the questions I'm asking you
8 right now in front of this jury; correct?

9 Answer: Correct.

10 Question: About who was there, what was
11 discussed?

12 Answer: Correct.

13 So this is a state employee, the state's
14 own witness. In 11 years as a medical examiner
15 he's not been told not to answer questions about
16 his investigation. He's not been told to not
17 answer questions that are the same questions that
18 are being presented to you, ladies and gentlemen,
19 the jury. Who was there? What happened? What was
20 your investigation? You heard that testimony.

21 In his 11 years he's never been
22 instructed by a prosecutor to keep something
23 secret, to not answer.

24 I'm going to tell you something. We
25 don't have secret meetings in the United States of

1 America when this is involved. Maybe if you're in
2 charge of SEAL Team 6 and you're going to go
3 capture or kill a terrorist, that's a good idea for
4 a secret meeting. Okay?

5 But if we're talking about the criminal
6 justice system, if we're talking about a man's
7 rights and whether he should be charged, whether a
8 man should be charged with a criminal offense, and
9 we're talking about the evidence. That's not a
10 secret meeting. You answer. That's what that book
11 requires. You're the government.

12 You're going to charge somebody with
13 something, you better answer, and you better
14 explain everything. Because you don't have secrets
15 in America about this. You don't have secret
16 trials or secret meetings. You don't instruct
17 state witnesses not to answer the first time in
18 their 11 years. They can say whatever they want.
19 They can say whatever they want.

20 You heard a witness on the stand, and you
21 will remember the facts are what you consider, not
22 the arguments. You don't even have to listen to
23 me. Listen to what Dr. Lyon said. I've been doing
24 this 11 years. And I've never been asked by a
25 prosecutor not to answer questions about my

1 investigation.

2 Here's the questions he didn't answer:
3 They never talked about the toxins. They never had
4 the ICU doctors in. They didn't put out all these
5 medical records. Just take medical records, put
6 them all on a big conference table. Let's look at
7 them.

8 Let's get the criminalist in. What does
9 she think? What should we be doing? I would pick
10 up the phone, call her. Hey, Ms. Sy. What would
11 you look for? I'm just a detective. I don't know
12 2-ethyl-1-hexanol. Tell me what to look for. And
13 do that.

14 They just gave the medical examiners
15 their vision, which they're now trying to give to
16 you, of what happened. It could only have been the
17 extreme heat-endurance challenge that caused these
18 people to die. That's the only way it could have
19 been. We don't have secret meetings in the United
20 States of America.

21 Your Honor, is this a good time?

22 THE COURT: Ladies and gentlemen, we will take
23 the morning recess. Of course, remember the
24 admonition. You cannot talk even among yourselves
25 about the case or the people involved in it.

1 Please be reassembled at about 10 till,
2 about 15 minutes.
3 I'm going to ask the parties to remain a
4 moment. Thank you.

5 (Proceedings continued outside presence
6 of jury.)

7 THE COURT: I wanted to talk a minute about
8 scheduling and anticipated time for deliberation.

9 Mr. Li and Ms. Polk, I'm going to ask
10 about estimates of time.

11 Just to let Mr. Li know, under the
12 guideline of the four hours, you're within five
13 minutes at this point, just to let you know. I
14 asked Heidi to show both sides what the remaining
15 time was starting this morning.

16 So I want to get an idea there, and I
17 want to talk about deliberation times. Because
18 I -- the jurors have been told Monday would not
19 normally be a day. I would want to have that be a
20 day if possible. But -- you know -- they've been
21 told a certain schedule.

22 Tuesday is a planned day. Wednesday I
23 indicated some time ago I wouldn't be available. I
24 would change my plans to make Wednesday available.
25 So I want to have that too.

1 But there is some things to talk about
2 because the jurors have been told certain days. I
3 want to talk about that and not have that just a
4 last-minute thing.

5 Mr. Li, can you provide an estimate so we
6 know where we're going to be today anyway.

7 MR. LI: Your Honor, I'm doing my best. There
8 is a lot to cover. I think there is probably at
9 least an hour more. And I appreciate the Court's
10 indulgence on this. But it's been a long trial,
11 and there is a lot of things to cover. I don't
12 want to mislead the Court. There is at least an
13 hour. And I'll do my best.

14 THE COURT: And, Ms. Polk, I indicated you
15 were going to have equal time, whatever that goes
16 to. There will be an equal amount of time for both
17 sides.

18 MS. POLK: Thank you.

19 THE COURT: But I want to know from attorneys'
20 standpoint and see if there is an agreement if at
21 all possible to have Monday, Tuesday, Wednesday
22 deliberation days.

23 Does everyone agree on that?

24 MS. POLK: We do.

25 THE COURT: Does everyone understand, however,

1 though, that representations have been made to
2 these juror for a number of times. There could be
3 a problem with Monday and Wednesday. And that
4 would make -- something I would want to avoid
5 normally. But a very large break in deliberations,
6 not the usual weekend that can come up but a longer
7 period of time.

8 I want to hear from the parties on that.

9 Ms. Polk.

10 MS. POLK: Your Honor, actually that does
11 raise concerns for state. Because I do believe
12 that a witness -- the jury was told that we would
13 not be in session on Monday, and a witness has
14 family plans. And I think -- I'm sorry. A juror.
15 I think unless a --

16 THE COURT: I'm going to leave it up to them.
17 But I wanted to know from the parties' standpoint
18 where you are first. I think if the juror decides
19 they can do it on Monday, I want them to be able
20 to.

21 MS. POLK: That would be fine. We're
22 available. I didn't want to force a juror to
23 change plans when we've made that representation.

24 THE COURT: That's going to apply to Wednesday
25 also because of what I've said previously. But I

1 want to make sure that from the attorneys, the
2 parties, you're not telling me you have issues with
3 Monday, Tuesday, Wednesday.

4 MR. LI: No, Your Honor. I'm fine on father's
5 day. I'm going to come in Monday morning. I think
6 I'll just drive straight to the Verde from Phoenix.
7 We might be 9:10 or something like that.

8 THE COURT: Well, that would be the early part
9 of deliberations in any event. And, of course,
10 that's another thing we can talk about later is how
11 to be available and for possible juror questions
12 and those things. That's what I need to clear up.

13 The schedule given I will abide by. If a
14 juror has made plans -- they've been told these
15 things at least for weeks on part of it, throughout
16 the trial, for Monday. But if they can schedule it
17 on Monday, Tuesday, Wednesday, and they agree on
18 that, then that's something that we would do.

19 Okay.

20 MR. LI: Okay, Your Honor.

21 THE COURT: About 15 minutes. Thank you.

22 (Recess.)

23 (Proceedings continued in the presence of
24 jury.)

25 THE COURT: The record will show the presence

1 of the defendant, Mr. Ray; the attorneys and the
2 jury.

3 Mr. Li.

4 MR. LI: Thank you, Your Honor.

5 This is America. In 11 years as a
6 medical examiner have you ever been asked by --
7 instructed by a prosecutor not to answer questions
8 about your investigation?

9 Answer: No.

10 There is something really wrong with this
11 case. Is this what you want from your government
12 if you were sitting there in Mr. Ray's shoes and
13 your attorneys wanted to find out what the facts
14 are from the medical examiner?

15 Did you guys look at this stuff? Did you
16 know about this? Can we find out? What did you
17 guys say at the meeting? Did you guys circle up?
18 Did you know about this tape? Can we find out?

19 Because -- you know -- Mr. Ray here is
20 accused of a crime. I got to do my job. Can I
21 find out what happened?

22 In 11 years as a medical examiner, never
23 been told by a prosecutor not to answer questions
24 about his investigation. I got to tell you, there
25 is something wrong with this case, profoundly

1 wrong.

2 And if you doubt that, imagine yourself
3 or your child or your friend or your spouse or
4 anyone you know and care about in that position.
5 Just imagine that.

6 Because it's not just about Mr. Ray here,
7 although today that's what we're deciding. This is
8 about your country, your government. That's what
9 this is about.

10 So then after the secret meeting, nothing
11 really happens. Dawn Sy, the criminalist, who had
12 been asked earlier to test for toxic volatiles --
13 remember, she wasn't at that meeting. In her lab,
14 like a CSI technician just dutifully doing her
15 work, doing those things they do in labs. And she
16 tests for -- from January 21 through February 2.
17 She's testing until February 2. She completes her
18 tests.

19 And remember, she finds 2-ethyl-1-hexanol
20 in this. This wasn't at the meeting, by the way.
21 She finds 2-ethyl-1-hexanol in that. And she finds
22 it in one but not the other.

23 In case there is any doubt, ladies and
24 gentlemen, in case there is any doubt -- this is
25 Exhibit 1014. It's a publication by the EPA, the

1 federal agency in charge of -- you know -- talking
2 about what things are toxic, what things are not,
3 what medicines. This is what they do. The
4 Environmental Protection agency. This is page 3 of
5 the memorandum. There is a different Bates number.
6 I don't know what it is.

7 A. Pesticides. 2-ethyl-1-hexanol is
8 used as a solvent that gets pesticides out -- you
9 know -- if you have a clump of pesticides, you can
10 sort of dissolve it into a fluid so then you can
11 spray it.

12 And you know who figured that out? I got
13 to tell you. Mr. Kelly, on our team. He figured
14 that out. And my dad is an organochemist. Just so
15 you know, our story ended up okay. He got back on
16 his feet and did very well for himself.

17 But his training is in organochemistry.
18 And we have this whole email thing back and forth.
19 Gosh, dad. What is this stuff? And then Tom finds
20 this whole thing in the EPA. It's a thing that you
21 use to lubricate pesticides. So if you want to
22 spray it from those containers that you see people
23 with it on their back, you need it in a form that
24 you can get it out there. You -- companies will
25 dissolve 2-ethyl-1-hexanol -- they're dissolve the

1 pesticide inside it.

2 And so then when the guy has it on his
3 back, he can spray it into one place. He can do
4 whatever he wants. You can get it going.

5 But here's the interesting thing: You
6 know who doesn't know about this? The state, the
7 prosecutors. They don't know anything about this.
8 Dawn Sy is just working in her lab by herself just
9 writing reports. Nobody cares.

10 And there she is. She finds trace
11 amounts of 2-ethyl-1-hexanol. This is Exhibit 345
12 on her report. She finds it in one but not the
13 other. That's interesting. I'm not saying that
14 that proves -- oh, that proves that there was
15 pesticide here. I don't know.

16 But it is interesting that you've got
17 tarps that are plastic. Okay? And the state wants
18 you to say, well, obviously it's plastic. But one
19 has it. One doesn't. Maybe you ought to follow
20 up. Maybe you ought to follow up.

21 If this is so obvious too, why didn't the
22 state go talk to her? It's so easy. You want --
23 this proves the state's theory and takes us from
24 over here all the way over to here beyond a
25 reasonable doubt -- if that's what this evidence

1 shows, talk to her. She's your employee. She
2 works for the executive branch, same branch these
3 prosecutors work for. Just give her a ring. Hey,
4 what is this stuff?

5 That doesn't happen. What does happen,
6 what does happen is -- what does happen is Mr. Ray
7 gets charged. That's what does happen. A month
8 and a half after the secret meeting, the day after
9 2-ethyl-1-hexanol is found, months after all this
10 medical evidence is created that nobody looks at,
11 months and months and months before they ever even
12 listen to their own evidence, they don't bother to
13 talk to Ms. Sy.

14 Why bother? They charge Mr. Ray. That's
15 what happened. Oh. And the report, never given to
16 the medical examiners. You heard from them. That
17 would have been an interesting thing to follow up
18 on.

19 The medical examiners are never even told
20 that there is any testing going on. Why not? I
21 mean, if you really want to figure this out, circle
22 up everyone. Let's have it all on the conference
23 table. That's what I'd do. I think that's what
24 you'd do. Get everyone in this room who's worked
25 on this case. Let's figure it out.

1 And in case you think that I'm just
2 making it up that the EPA publication that I just
3 showed you is part of the house of cards and
4 baloney that the defense is trying to feed you from
5 the take-out menu of an expensive restaurant, just
6 in case you're thinking that I'm just serving up
7 some baloney, here's -- this is a state employee,
8 Dawn Sy.

9 And you also indicated that it was used
10 in pesticides?

11 Answer: Yes.

12 What is it used as in pesticides?

13 Answer: Just as a solvent carrier for
14 the pesticide itself. Just as a solvent carrier
15 for the pesticide itself.

16 The state just didn't care. They didn't
17 care. They didn't ask. Detective Diskin didn't
18 even know what 2-ethyl-1-hexanol was when Mr. Kelly
19 wrote it up here and asked him. Never heard of it.
20 Wikipediaed it a few days later.

21 What do you have a crime lab for in
22 Phoenix if you don't use it? This is a like a CSI
23 episode where you have the lab guys and women all
24 working in there doing the things, finding DNA,
25 finding ballistics, blood samples. All kinds of

1 stuff is happening in there. And it's all
2 happening over here, but the police, the guy who is
3 supposed to actually do something with all this is
4 standing over here with his back faced to it all
5 and just sort of ignoring it.

6 It would be like a show where the
7 detective actually never walks into the CSI room
8 and says hey, guys. What do you got? What do you
9 got for me?

10 Why do your tax dollars go to pay these
11 folks if we're not going to look at it? What's
12 that about? Should the folks at Yavapai County get
13 a refund for whatever percentage of her salary was
14 spent doing all this stuff that never got looked
15 at?

16 And one other interesting thing in
17 another unrecorded conversation with Ms. Polk,
18 another unrecorded conversation. Remember Ms. Sy
19 said -- you know -- I didn't test for
20 organophosphates. I have no idea whether this
21 would find organophosphates. Well, yeah. She
22 didn't test for organophosphates because she wasn't
23 asked to. Somebody actually talked to her.

24 And you remember how the defense had to
25 call her? I mean, the defense had to call a DPS

1 employee. We had to go get the DPS employee and
2 put her out here so you could actually see what the
3 science is. Why is that?

4 Why does Mr. Ray, who doesn't work for
5 the State of Arizona, doesn't have the resources --
6 why is it that Mr. Ray has got to get the state
7 employee in here to testify about what she found in
8 the labs? If it's -- why?

9 And I just want to point something out.
10 The state in trying to answer that question, you
11 will recall -- I think you will recall, Ms. Sy, you
12 had vacation plans in Hawaii, didn't you? And you
13 had vacation plans, and it kind of conflicted. And
14 that's why we didn't hear from you. This is
15 vacation. So that's why. The state was just being
16 nice.

17 How many of you -- look at yourselves.
18 You've sacrificed four months here. I know there
19 are some of you who are sacrificing right now who
20 have plans, really important plans, and are
21 sacrificing to do your duty. Okay? To do your
22 duty. You're sacrificing.

23 But the state -- you know -- they don't
24 need to call this employee who is going to tell you
25 all this stuff because she had vacation plans kind

1 of got in the way. Forget it. While you're
2 sacrificing here four months.

3 Is that how you want your government to
4 work? Or is the answer actually that what Dawn Sy
5 had to say isn't very helpful to the case for the
6 state? Is it possible that the state didn't call
7 her because Dawn Sy would give you that real
8 possibility that Mr. Ray didn't kill these folks?
9 How about that? How about it wasn't a vacation
10 plan? How about this looks bad?

11 So Ms. Sy's report is finished. It gets
12 sent. It actually gets sent sometime in the next
13 couple weeks. The detective doesn't even look at
14 it. Nobody looks at the objective evidence, the
15 science, the tapes, the 2-ethyl-1-hexanol. Nobody
16 talks to the criminalist.

17 You know why? I'll tell you why.
18 Because, look. There's a camera over there. There
19 is a big media event. We just arrested somebody
20 for the sweat lodge killings. And we got a camera.
21 We've had that camera in the courtroom every single
22 day.

23 And when you guys first started, you will
24 remember there were trucks everywhere as you walked
25 into the courtroom. Trucks everywhere. We got a

1 new camera here today, this one. We don't have
2 time to deal with science. We don't have time to
3 deal with what people actually have to say. We
4 don't have time for tests. We don't have time for
5 medical records that say no heat stroke. We don't
6 have time for medical records that say there might
7 be toxins involved. We don't have time for that
8 because we just indicted Mr. Ray. And we've got
9 things to do. We just indicted Mr. Ray, and there
10 are trucks everywhere, and we've got things to do.

11 Is this how you want your government to
12 work? Is it? And I'm sorry if I'm being harsh. I
13 am. I'm sorry if I'm being harsh. Because, as I
14 told you in the beginning, it's not about me. It's
15 not what I think. I have to really believe in this
16 system. I really do. But it's not about me. And
17 I'm sorry if I'm being harsh.

18 This is about Mr. Ray, the defendant.
19 This is about a man who has been charged with a
20 crime by the State of Arizona. And this is about
21 you and each and every one of you and what kind of
22 government you want. So I'm not going to make the
23 call. At the end of the day you're going to make
24 the call.

25 So if I'm a little heated about this, I

1 apologize. It's not about me. And it's not,
2 frankly, about the prosecution team. What it's
3 about is what kind of government you want, ladies
4 and gentlemen. It's about you and what decisions
5 you want to make about your country.

6 And why is that important? Okay.
7 Mr. Ray is charged. All the trucks are out there.
8 Everything starts happening. None the reports get
9 read. None of the medical evidence gets looked at.
10 Nothing.

11 And then here's what happens: It's
12 February 2011. So that's about a year before the
13 trial. Here's what happened: March, April, May,
14 June, July, August they're talking to people.
15 They're making some interviews. They're talking to
16 people like Beverly Bunn.

17 You know what I forgot to mention that's
18 happening here? Oh. Amayra Hamilton is talking to
19 the press about once a month after -- on the stand
20 I asked her, so did you talk to the press ever?

21 And she says, well, I talked to one
22 reporter that I really trusted a lot, who happens
23 to be in the courtroom over there. Ms. Fonseca. I
24 talked to her. That's the only person I talked to.
25 Oh. Except for the 13 or 14 other interviews I

1 gave with national TV, local TV, NPR, New York
2 Times. So that's the one thing I haven't mentioned
3 here.

4 So it's August 2010. What's happening?
5 Nothing. September? Nothing. October? Nothing.
6 November? Nothing. December? Nothing.
7 January 2011, a year after the accident -- I'm
8 fudging a little. But it's -- I'm sorry -- a year
9 after Mr. Ray's indictment. I've got it off by
10 about three or four days. Okay?

11 The state interviews -- you can't read
12 this too well. But the state interviews Dr. Paul.
13 And he says, hey, you know what. I've looked at
14 all these records. I did what you guys should have
15 done. I circled up. I pulled all the stuff
16 together. When I didn't get it, when it wasn't
17 there, I asked for it because I'm actually looking
18 at the records. I'm reading them. And I notice,
19 you know what, stuff is missing. Stuff is missing.
20 I'm going to ask for it.

21 So on this day, January 31, 2011, he
22 says, I've looked at this stuff. I still need to
23 get some more. But it doesn't look like heat
24 stroke to me. I'm seeing very strange symptoms.
25 I'm seeing pinpoint pupils. I'm seeing the lack of

1 recorded clinical evidence of recorded elevated
2 temperature. I'm seeing no severe dehydration.
3 Those things are not consistent with heat stroke,
4 and they are consistent with a toxicity. So that's
5 what I'd ask. So I'd ask maybe some kind of toxin.
6 One of the ones I'd look at is organophosphates.

7 So what did the state do? Did they go
8 back and talk to the medical examiners and try to
9 say hey, did we get it wrong? Did we get it wrong?
10 No. No. They didn't do that. They tested for
11 organophosphates.

12 So I'm going to point out a couple things
13 to you about this. Okay? First is Dr. Dickson
14 said -- you know -- the testing for
15 organophosphates -- it's all -- you know --
16 theoretical. It's not a real test. The literature
17 suggests there might be some way to test for it.
18 Really it's not much of a test. It's not real.

19 Except there is a company that they use
20 called "AIT Laboratories" that prosecutors use all
21 over the country to test for all kinds of things,
22 like blood alcohol or whatever, drugs, vitreous
23 fluid, everything that they send these to.

24 And you know what. They do test for
25 organophosphates. This is Exhibit 811. So there

1 is actually a test for organophosphates. It does
2 happen to be 17 months too late. And then so
3 that's one.

4 Two, if this theory about
5 organophosphates is just cockamamie, baloney,
6 something pulled off of a menu from -- a take-out
7 menu from a fancy restaurant -- if that's the case,
8 what are you doing? Why are you testing? What do
9 you care? Why would you chase this silly clue if
10 it's so stupid? But it is too late. It is a
11 little too late.

12 And here's what you learn: So they
13 tested it. And they tested it on the 8th. Jury
14 selection begins on the 16th. I don't recall which
15 ones of you were here on the 16th. But some of you
16 folks were here on the 16th. This is seven days,
17 eight days, before jury selection. If they know
18 beyond a reasonable doubt that they got it, it's
19 done, we're done, we're here, it's heat stroke, we
20 know that, what are they doing?

21 And then you know what happens is they
22 find out. They find out before we start jury
23 selection. Then they find out that it's too late.
24 Their own doctors tell them hey, it's too late to
25 test for organophosphates, by a long shot. It's

1 too late. Okay? They don't record an interview.
2 They don't do anything like that. They find this
3 out. It's too late. They find it out in February.
4 They test on the 8th, find out a little later. By
5 now jury selection has begun.

6 March 1 I do my opening statement to you
7 all. I play that tape. This is the first time
8 Detective Diskin has ever heard that tape. Opening
9 statement I play that tape. I talk about
10 organophosphates for the first time.

11 And you know what happens the next day?
12 So March 1 I give my opening statement. I remember
13 being here with you guys. What happens the next
14 day after I give my opening statement, after I play
15 the tape -- okay -- then the state, the Yavapai
16 County Attorney's Office, writes me a letter
17 saying -- hand-delivered saying, oh. You know
18 what. I talked to these doctors at the lab, and
19 they tell me that organophosphate tests may not be
20 significant due to the passage of time, after I
21 play the tape.

22 It would have been nice to just come
23 clean earlier and say, hey, you know, we tested.
24 We didn't know it wasn't going to work. But then
25 they told us it wasn't going to work. Oh, no.

1 Let's not do that. Let's wait until Mr. Li talks
2 to you all, talks about organophosphates and all of
3 that. Let's wait until that happens. And then
4 afterwards let's tell him what we've known for a
5 little while. Is that how you want your government
6 to be?

7 We're not even through. We're not even
8 through. So then I played the tape in opening
9 statements. And you probably don't remember.
10 There is a big objection. And then we had months,
11 months, because by my record, that tape wasn't
12 admitted until April 27 or something like that. So
13 we're talking two months into trial. We had months
14 and months we can't play this to the jury. We
15 don't know who it is. It's some unknown person,
16 some ridiculous person. Who knows who this is
17 talking on the tape? It could be anybody.

18 Even in the closing arguments that
19 Ms. Polk made, she said if it is an EMT. Okay?
20 But here's the problem: In March while you were
21 all here, while we were in trial, remember this
22 parade of participant witnesses came in. Dawn
23 Gordon, who is one of the last witnesses on the
24 stand that you saw -- she actually did come in.
25 And I sat in there and had a meeting. We talked

1 about this on the stand. We had a meeting with the
2 state about 15 minutes. That's it. I played the
3 tape for her. She said, yeah. That's an EMT.
4 Okay?

5 That's in March, March. Tape's not in
6 until late April. State is still saying they don't
7 know who that is for sure. Okay. But then -- and
8 this is a state's witness. It's not my witness.
9 This is the state's witness. She was called in
10 March for the state.

11 And so Ms. Polk, the state, tries to say,
12 isn't it true you told -- do you recall telling
13 Mr. Li and Mr. Hughes back then, March, that you
14 couldn't recall whether it was an EMT who had said
15 it? What did she say? That's not correct. That's
16 not correct. That's what the state witness has to
17 say about who is on that tape.

18 And then I asked her on
19 cross-examination, because she's not my witness --
20 I've met with her, and you heard. I met with her
21 probably a total of 50, 60 minutes with either one
22 of the prosecutors there. That's it.

23 And I asked her a question, and I'm
24 talking about the tape. He said, we don't know
25 how, but there may have been carbon monoxide with

1 organophosphates mixed in somehow?

2 Answer: Yes.

3 Question: And this is the EMT? That was
4 an EMT who said that; correct?

5 Answer: Yes.

6 Question: It would be misleading, would
7 it not? It would be misleading to tell this jury
8 that, oh, we don't know who it is, wouldn't it?

9 Answer: Yes.

10 It's a witness called by the state. Why
11 are we playing these games? Why are we playing
12 these games?

13 We're not even done. On March 5 the
14 medical examiner, Mosley, tells -- gets the
15 negative test for organophosphates but tells the
16 state that, you know what, these are worthless.
17 The state doesn't get them until a month and 13
18 days later. That's Exhibit 998.

19 So that's where we are for now. But
20 we're not even done. This is the state's backfill.
21 We're not even done. Now the Hamiltons. Now
22 instead of all of this science -- you know --
23 testing, objective medical facts, this stuff --
24 instead of all this, here's how the state's going
25 to fix this problem. Here's how -- we're going to

1 talk to the Hamiltons. They're going to fix it.
2 They'll explain -- they'll prove to you, ladies and
3 gentlemen, beyond a reasonable doubt -- you got to
4 believe the Hamiltons beyond a reasonable doubt,
5 over here, that there were never, ever, ever
6 insecticides at Angel Valley because --

7 So what they do is on March 21 -- this is
8 after my opening statement, all of that -- they
9 go -- Detective Diskin goes and in interviews
10 Mr. and Mrs. Hamilton together with no tape. Okay?
11 And what they tell Detective Diskin and what you
12 are being asked to believe beyond a reasonable
13 doubt is that the Hamiltons do not believe in
14 pesticides.

15 But despite that fact, sometimes they use
16 rat poison in their -- in the pump house, just like
17 Ted Mercer said in his statement. They only use
18 Just One Bite. Just one kind. There it is.
19 That's what they use. They use Just One Bite. And
20 they use rat poison because the benefits outweigh
21 the risk. They don't use other poisons.

22 So they gave us exhibits -- the next day
23 they gave the detective exhibits 798 and 799.
24 These are the biscuits that Amayra Hamilton was
25 talking about, the cookies that Amayra Hamilton was

1 talking about, that are the pesticides. These are
2 the only pesticides they use because of their
3 philosophy. Okay?

4 And you will recall on the stand that
5 both, I think, Ms. Do and Mr. Kelly when they were
6 asking -- just as he started walking up to the
7 witnesses to talk about the photographs, both of
8 them in separate ways blurt out they're staged.
9 They're staged. You know. They're staged. Okay.
10 Yeah. They are staged. They are staged.

11 Why do we need staged photographs in a
12 criminal case? Is this like the -- you know --
13 Communist Russia and we have -- you know -- fake
14 trials and staged things, and this is how it would
15 have looked when comrade somebody did something to
16 someone else? That's what it would have looked,
17 and so we'll just give you it to you commissars,
18 and you'll decide for yourselves. But that's what
19 it would have looked like.

20 Why is Detective Diskin even asking for
21 staged photographs? And I'm not accusing
22 Detective Diskin of trying to fake you out with
23 that. Because everybody came clean and said
24 they're staged. But just ask yourself this
25 question: What do we need to stage photographs --

1 what do we need a reenactment for in a criminal
2 case? Why do we need a reenactment?
3 Well, we're not even done yet. Because
4 on April 1 in front of you in trial Fawn Foster --
5 remember her? Fawn Foster testified they used all
6 kind of rat poison -- different colors, green ones,
7 little chunks, big chunks. Used all kinds of
8 different rat poisons, and we used an ant killer
9 one time. One time. Used an ant killer only one
10 time. Once.

11 And so this is after the Hamiltons have
12 gotten -- talked to Detective Diskin in an
13 unrecorded conversation and said, other than Just
14 One Bite, we don't use any other kinds of poisons
15 because that's not our philosophy. We don't do
16 that. That's not how we run Angel Valley. Oops.
17 Oops. Their employee comes in and says we use this
18 other stuff. We use other stuff.

19 Then on April 6 the defense finally gets
20 the interview. The defense gets the interview.
21 Not finally. Gets the interview or interviews.
22 Strike all that.

23 The defense interviews the Hamiltons
24 separately, recorded. And here's what they tell
25 you: They say, you know, you're right. We forgot

1 to mention it the first time we talked to
2 Detective Diskin when it was unrecorded and we were
3 talking. We forgot to mention this. We do use
4 other kinds of rat poison here at Angel Valley.
5 And we do use AMDRO once in 10 years. And yeah.
6 That's right. That's what we do.

7 And then they give us pictures.
8 Exhibit 882. So this is -- their Photoshopped.
9 Remember Mrs. Hamilton told you they're
10 Photoshopped. Now, I'm not saying she faked the
11 pictures. Those are pictures of d-CON, Just One
12 Bite, Eaton, the other kind of rat poison. But she
13 Photoshopped the dates in for you. And she says
14 that these are normal computer or camera registered
15 dates. She Photoshopped these in for your
16 convenience.

17 Here's what happens: Wow. So on
18 October 26, 2006 -- so they've taken these pictures
19 of the rat poison in the hood of their truck five
20 years ago, and they just keep it because it's
21 interesting.

22 And then in -- sorry -- two days later
23 the rats have eaten it all. That's a lot of rat
24 poison for a pack of rats to eat. Any of you put
25 rat poison out there, it does not get eaten quite

1 that fast.

2 Remember the movie Ben with the rats that
3 just come out of -- thousands of rats come out of
4 the sewers and just -- that's a Ben -- a scene out
5 of Ben.

6 We're not done. Okay. So that's just
7 one -- I'm thinking that's maybe a pound, two
8 pounds, of rat poison. We're not done because
9 that's just in two days. You know what, we got
10 another day. This is Exhibit 883. And you can see
11 this is in the course of one day.

12 So the first crew of rats, probably
13 enough rats to fill the jury box, the first crew,
14 the first shift, comes in and consumes several
15 pounds of rat poison with Just One Bite. I'm
16 sorry. Am I too loud? With Just One Bite. And
17 you know Just One Bite will kill you if you're a
18 rat. And a rat has a little mouth. You know?

19 So we got this crew of rats coming in,
20 and in two days they plow through it. It's like a
21 rat party. And then the next day those same rats
22 call their buddies and say hey guys, there is a ton
23 of rat poison her. Get over here. And thousands
24 of more rats come flying into Angel Valley from all
25 the surrounding valleys. It's like all the rats

1 from every valley and dale in Sedona decide here's
2 our chance. Because there is a truck. There is a
3 truck filled with bate, guys. Let's go.

4 That's the story. I didn't put it up
5 here. I'm accused of giving you baloney. Okay?
6 I'm accused of feeding you a story, a house of
7 cards of baloney, plutonium, menus from a fancy
8 restaurant. That's the defense. That's what the
9 defense does. They give you baloney.

10 But -- you know -- hey. Hey. Hey.
11 25,000 rats eating pounds and pounds of rat poison
12 in three days in a hood of a car. And oh, by the
13 way. The Hamiltons just happened to save it on
14 their computer for five years. You know, and there
15 it is. I got pictures of the rat poison that Fawn
16 Foster mentioned on April 1.

17 Who do you believe? Do you believe that?
18 Ms. Polk said good old common sense. Let me put it
19 to you. Good old common sense. Good old common
20 sense. Good old common sense. One day? The
21 second time? One day? Good old common sense.

22 But we're not done. This is just what
23 they told us. Because they actually came into
24 court and talked to you under oath. And now let's
25 talk good old common sense and the baloney I'm

1 trying to feed to you guys, you all. The baloney.
 2 I'm now the baloney salesman for you. Okay.
 3 So good old common sense. Here come the
 4 Hamiltons. They come in and testify. You can
 5 believe whatever you want to believe in the world.
 6 And that's not my business, and I don't care. I
 7 mean -- you know -- you can believe whatever you
 8 want to believe.

9 But here's what they came in and told us:
 10 Mr. Hamilton first. He says hey, you know what.
 11 We don't use poisons -- okay? -- except for very
 12 few times like this. We don't use it very often
 13 except a few times. Because here's what I do: I
 14 talk to them. I talk to the little critters. Here
 15 they are crawling on the path, and I say hey, ants,
 16 get out of here. Get on out of here. That's my
 17 first line of defense.

18 And, look. I'm obviously a little
 19 animated about this. Okay? And I apologize. But
 20 we are in a court of law. Okay? And you had a
 21 witness under oath tell you this story about rat
 22 poison in the trunk -- or in the hood of the car.

23 This is a criminal case. We had a
 24 witness come in here and tell you about this under
 25 oath. The people who own Angel Valley. All right?

1 And this is the proof that the state says they told
 2 you, ladies and gentlemen, in their closing
 3 argument -- they told you beyond a reasonable doubt
 4 we've got James Ray dead to rights beyond a
 5 reasonable doubt because you know the state has
 6 proven to you beyond a reasonable doubt that there
 7 were no poisons at Angel Valley.

8 And who do we have to rely on that?
 9 Who -- how do we know that? Well, we've got the
 10 good folks at Angel Valley. That's how we know.
 11 And that's the guy who comes in and says my first
 12 line of defense is to talk to the ants.

13 Well, one of the folks back there told me
 14 there is another cricket back there. Okay. I
 15 don't think any of us can convince that cricket
 16 through the power of our thoughts, words or
 17 whatever, to get out of here. We got to get him in
 18 a cup and let him go or kill him or whatever.

19 So what you got to believe, ladies and
 20 gentlemen, beyond a reasonable doubt is this man
 21 who comes in and says all that stuff to you, says
 22 the rats eat all the poison like that -- you
 23 know -- and I talk to the critters and tell them to
 24 get out of here.

25 And that's why the only time, the only

1 one time ever that they've used ant poison --
 2 because they know. Remember he used this great
 3 phrase. Well, that's my truth. You know. That's
 4 my truth.

5 You don't get your own truth. Maybe
 6 Abraham Lincoln said you're entitled to your
 7 opinions. But you're not entitled to your own set
 8 of facts. That's not how it works. You don't get
 9 your own truth. You get the truth.

10 Okay. So the way we know that there is
 11 no poison is it's only one time, and they've only
 12 had to do it once, use ant poison, because they can
 13 talk to them.

14 But we're not done. Just in case you
 15 didn't get it from Michael Hamilton, you get it
 16 from Amayra Hamilton. She said, we don't need
 17 pesticides. We talk to them. And Fawn Foster.
 18 She's really good at it. And so is Debbie Mercer.
 19 They're good at this. And that's why for 10 years
 20 we don't need pesticides here. They're good at
 21 talking to the animals. Ted Mercer, not so good.
 22 But those other folks, they can talk to the
 23 animals.

24 You know one person who can't talk to the
 25 animals, one person definitely can't talk to the

1 animals, one person the government never actually
 2 talked to ever, ever, is this man right here,
 3 Rotillo. He's the groundskeeper.

4 See, most of us, I think, in our world --
 5 this is Exhibit 144. Most of us -- and I'm
 6 guessing that this is Rotillo. Okay? I just
 7 perused these photographs, and he doesn't look like
 8 any of the participants. He looks like he's there
 9 with the Mercers. I don't know if that's Rotillo.
 10 The government never talked to him.

11 Let's just talk about common sense and
 12 experience. Most of us when we either hire
 13 somebody to deal with pests -- groundskeepers or
 14 whatever to deal with pests -- they use
 15 insecticides. They don't talk to them. They kill
 16 them. And -- you know -- I like -- I didn't kill
 17 that little cricket. But that's what normally
 18 happens to bugs that are infesting places.

19 And if you all use your common sense and
 20 experience, you see bugs everywhere, you know.
 21 Everywhere you look there are ants crawling all
 22 over the place.

23 And imagine yourselves down to your swim
 24 trunks or swimsuit, and you're lying sweaty hot and
 25 all that stuff and lying on the ground. Do you

1 want -- I mean, you can imagine somebody saying we
2 don't want our guests who are paying thousands of
3 dollar to be here -- we don't want them covered in
4 ants, bugs, centipedes. We don't want that.

5 So somebody says let's deal with that. A
6 good guy, Rotillo -- I'm sure he's a good guy.
7 I'll take care of it, boss. You know what, there
8 is all these bugs in the pump house. There is
9 bugs. There is rats. There's all kind of stuff in
10 the pump house. Of course, there is bugs and rats
11 and animals in the pump house, because there is
12 water in the pump house. You know. It's Arizona.
13 They want to get there. It's nice and sheltered.

14 Okay. Let's deal with that. Let's put
15 the rat poison down on the floor. Let's spray some
16 insecticides in there. Let's just deal with it.

17 And, you know, maybe some it of gets on
18 the tarps. 2-ethyl-1-hexanol. Maybe. But the
19 state wants you to think that that theory, that
20 that sort of just set of facts I gave you is just
21 baloney. There is no way that happened beyond a
22 reasonable doubt. There is not even a real
23 possibility that that's what happened.

24 It's really just beyond a reasonable
25 doubt, the highest standard. This is the kind of

1 evidence that you can pull the plug on somebody
2 who's on life support. This is the kind of
3 evidence -- more than. Sorry. More than what it
4 takes to pull the plug on somebody on life support.
5 More than what it takes to take some kid --
6 somebody's kid away. More than that. Okay? Way
7 more than that.

8 There is not a real possibility that what
9 I just told you might have happened. And you know
10 why? What's the proof of that, ladies and
11 gentlemen? What's the proof that the State of
12 Arizona is presenting to you? The Hamiltons, the
13 bug whisperers. That's it. That's the evidence.
14 You can believe that beyond a reasonable doubt.

15 I don't care, ladies and gentlemen,
16 whether they really can or can't, whether they
17 think or they can or can't, whether they're nice
18 people or not nice people. It's not about that.

19 I'm not trying -- I am obviously
20 animated. It's not about that. It is a question
21 of whether that has any place in a criminal, a
22 criminal, trial where the Constitution and the laws
23 of the United States are at stake. Is that what
24 you're being asked to rely on beyond a reasonable
25 doubt? Is that? Ask the state.

1 So are we to believe that this is the
2 only poison that was ever used except for these
3 poisons and the ant killer? Is this is all the
4 poisons? And we don't need science. We don't need
5 testing. We don't need medical records. We don't
6 need to listen to our evidence. We don't need
7 testimony. We don't any of this at all. We don't
8 need any of that.

9 Because when you have the good folks at
10 Angel Valley, you can ignore all of that and just
11 say beyond a reasonable doubt the state has proven
12 to you that there were no pesticides at
13 Angel Valley beyond a reasonable doubt.

14 Forget all that. That's ridiculous,
15 baloney. That's all baloney. But the good folks
16 at Angel Valley, they get us beyond a reasonable
17 doubt that there were no pesticides. The
18 Hamiltons, the good folks at Angel Valley, who
19 built the lodge, had the lodge built with no
20 supervision. You remember that?

21 Michael Hamilton told you here's how he
22 met the guy who built the first sweat lodge. At
23 In-N-Out Burgers. Okay? Doesn't really know the
24 guy who built the -- designed the second sweat
25 lodge and had the Mercers build it.

1 He's the guy who doesn't really know how
2 any of the things are being stored except for his
3 own truth. He knows his truth that there was no
4 poison in there for sure. He just knows that --
5 who has been sued.

6 It would really be a bad thing for his
7 case in a civil case -- okay, ladies and gentlemen?
8 A civil case, not a criminal case. I don't
9 think -- we're not talking about a criminal case.
10 I don't even care. We're talking a civil.

11 It would be bad for his civil case if
12 they used insecticides. Isn't that obvious? Isn't
13 that why he's fighting so hard? Only once. Only
14 twice. Isn't that why -- who made \$100,000 on the
15 event and who claims to talk to animals?

16 The other people you need to -- the other
17 good folks you need to listen to from Angel Valley
18 are -- you've got Mark Rock. You got Mark Rock,
19 who the State of Arizona by and through the County
20 Attorney, Sheila Sullivan Polk, and her deputy
21 undersigns, request immunity to be granted to Mark
22 Rock.

23 So that's another guy we need to rely on,
24 another good folk at Angel Valley, who claims to
25 have PTSD, who is tape-recorded in interviews you

1 listened to. And I'm not going to fight with him
2 as to whether or not he has PTSD. I don't know.
3 Okay?

4 But here's the part that seems rather
5 interesting and you should consider: That he lived
6 at Angel Valley. He lived at Angel Valley. And
7 while he was living at Angel Valley, they had
8 therapy sessions with the Hamiltons. And the
9 Hamiltons helped him recover repressed memory that
10 he then came in and testified to you about under
11 the grant of immunity asked for by the State of
12 Arizona. He had repressed memories that came back
13 by talking to the Hamiltons.

14 Like the Mercers, good folks at Angel
15 Valley, who supplied the wood, created the lodge,
16 talked about the rat poison. At least one of them
17 is, according to Ms. Hamilton, good at talking to
18 animals, whose lawyers came to court every day.
19 Nice lady. She comes to court every day.

20 Like Fawn Foster, who is a very good
21 animal talker, who has been convicted of lying to
22 the police and other felonies, who just had to get
23 the alpha and omega stuff out, just had to pop that
24 out in a homicide case; and who says that she heard
25 conversations -- and you heard the state talk to

1 you about the conversations that she heard inside
2 the sweat lodge from out there, 50 feet away. I
3 don't have enough room in this courtroom. And she
4 was sitting on a log 50 feet away. And she hears
5 this conversation, and she knows exactly what's
6 going on.

7 And you all might remember the fight we
8 had about how far that log was. Was it 6 feet?
9 Was it 12 feet? Was it -- how far was it away from
10 the door of the sweat lodge? We had days of
11 argument with where should we stand here.

12 You know what's really something you need
13 to consider is you need to consider that the state
14 had a witness, a former policeman, who did a
15 computer graphic, who did GPS coordinates. You
16 remember him? Who did GPS coordinates of exactly
17 where everything was, measured it out, triangulated
18 everything.

19 They had that information, ladies and
20 gentlemen. That's the state's evidence. They knew
21 exactly where that log was. It's in evidence.
22 What do we have -- why does Yavapai County paying
23 for a command RV, the software, the crime software,
24 where you can figure out where things are -- why
25 are you all paying for all that if we're not going

1 to pay attention to it at all?

2 Why are we going to have argument -- why
3 are we going to ask Fawn Foster how far the log
4 was? Remember Ted Mercer said the creek was 150
5 yards from the sweat lodge? 150 yards. That's
6 far. Okay? It's not 150 yards.

7 Why are we talking to these guys, the
8 animal whisperers, the convicted person who has
9 lied to the police? Why is the state parading
10 these people in here in a criminal case where a man
11 is on trial in a criminal case? Why are we doing
12 this? Why are we playing these games when they
13 have it in their own file the exact distance of how
14 far that log is? Why are we playing that game?

15 And you're going to get a chance to read
16 the credibility instruction, which is instruction
17 3B. When you read this, it's like you want to talk
18 about a menu? Okay? This is the menu that you
19 need to consider -- the good folks at Angel Valley,
20 their testimony. This is the menu that you need to
21 look at.

22 You should use the tests for truthfulness
23 that people use in determining matters of
24 importance in everyday life, including such factors
25 as the witness's ability to see or hear or know the

1 things testified to. 50 feet away, out the door.
2 The quality of the witness's memory; the witness's
3 manner while testifying; whether the witness had
4 any motive, bias or prejudice; whether the witness
5 was contradicted by anything the witness said or
6 wrote before trial. And I might add was recorded
7 before trial. Whether the witness was granted
8 immunity by law enforcement, or by other evidence.

9 That contradicts them. That's your
10 common sense. That's what Ms. Polk said. You
11 don't leave it at the door. You don't leave it at
12 the door. You bring it right in here. You bet.
13 Bring it right in here and ask yourself is this --
14 is this okay? Is this all right having the
15 Hamiltons come in here and tell you all that and
16 have the state tell you you're going to rely on
17 that beyond a reasonable doubt? Is that all right?

18 And, folks, it's not all right. It's not
19 all right. It's not all right at all. It's not
20 all right at all. This is not just me picking on
21 the state or me picking on Detective Diskin or me
22 picking on the Hamiltons. This is the law.
23 Page -- 4D, page 4. It's in your instructions.
24 Take a look at it.

25 As the Judge instructed you, if you find

1 that the state has lost, destroyed or failed to
2 preserve evidence whose content or quality are
3 important to the issues in this case, you should
4 weigh the explanation, if any, given for the loss
5 or unavailability of the evidence. If you find
6 that such explanation is inadequate, you may draw
7 an inference that's negative -- I'm sorry. You may
8 draw an inference unfavorable to the state, which,
9 in and itself, can create a reasonable doubt as to
10 the defendant's guilt. That's what you got right
11 there.

12 And why is this? As I told you before,
13 because our government -- we expect a lot of our
14 government. We do not expect our government to
15 willy-nilly do this stuff. We do not expect our
16 government to bring in and tell you beyond a
17 reasonable doubt folks like the Hamiltons should be
18 believed. The good folks at Angel Valley prove
19 beyond a reasonable doubt that no pesticides were
20 used. Ignore all of that. Our government does not
21 do that.

22 I'm going to give you three things that
23 you need to think about with regard to these
24 Willits instructions. Three things. You can
25 probably think of more -- okay? -- of things that

1 were lost or failed to be preserved and that you
2 can hold against the government.

3 First, blood samples. Okay?
4 Straightforward blood samples. If they tested
5 positive for organophosphates, this is over. We
6 shouldn't even be here. It's an accident. Things
7 like this happen. It's terrible. There might be
8 civil liability for all kinds of folks. It's not a
9 criminal case. It's an accident. Sounds important
10 to this case.

11 So I think we found the blood samples
12 were not preserved. They are important to this
13 case. And why weren't they preserved? What's the
14 explanation? Dr. Lyon and Dr. Mosley would have
15 tested. Dr. Cutshall would have tested. Dr. Paul
16 would have tested. Even Dr. Dickson, saying that
17 they're theoretical, would have tested. He
18 eventually admitted that he would test it if you
19 could have them.

20 And that's what the state actually did 11
21 months after the fact even though it's too late.
22 Even though there are EMT folks saying there might
23 be organophosphates. Even though there are medical
24 records saying there might be toxins, their
25 symptoms consistent with toxins.

1 Here's the state's excuse: We didn't
2 know. We didn't look. That's the excuse. Or
3 Detective Diskin on his first homicide case as a
4 case agent, his first landing on that aircraft
5 carrier. I never talked to the -- I didn't talk to
6 the ER guys. I didn't talk to the toxicologist. I
7 didn't talk to the criminalist. I didn't talk to
8 anybody. Nobody thought about this.

9 Ladies and gentlemen, that's not good
10 enough. Okay? That's driving that plane right
11 into the back of the carrier. That's destroying
12 somebody's life. We don't do that in this country.
13 And you can hold it against the government. And
14 you can in and of itself find reasonable doubt
15 because of that.

16 That -- the fact that those samples
17 weren't tested has robbed each of you who have
18 spent four months here of a very important fact.
19 Each of you have been robbed of that fact.

20 The soil. They collected -- you know --
21 you saw it. They collected four cubic inches.
22 Dawn Sy. She could -- Dawn Say said she could test
23 it. But over 99.99999 percent of the soil was not
24 preserved.

25 It could have been. It could have just

1 put the tape -- kept the tape out there, called
2 Dawn Sy. Say hey. What do we need to collect?
3 How many samples? How much area? Call people.
4 Get them to work. Circle up everyone. Let's
5 figure this out. They didn't do that. But it
6 didn't matter. They didn't even test the samples
7 they had.

8 The tarps. The tarps. They collected
9 four 10-by-10 square pieces. Over 99 percent of
10 the rest is just gone, ripped up by Mr. Hamilton,
11 thrown away. Okay? They could have kept that.
12 They could have just done what the Hamiltons do,
13 fold it up and stick it in an evidence locker
14 somewhere. Why not do that? And then if we got to
15 figure out, hey. Gosh. Was there some poison on
16 this stuff? Is there something we need to look at?
17 Let's pull it out of the evidence. They didn't do
18 that. They gave it to Michael Hamilton, who cut it
19 up into little pieces.

20 Had they followed the 2-ethyl-1-hexanol
21 clue, they might have said oh, my goodness. This
22 might be organophosphates. Who knows. There might
23 be some kind of pesticide. Let's pull them all out
24 and test them. They didn't do that.

25 You're going to hear from the state. Why

1 didn't the defense test this and why didn't the
2 defense -- first of all, it's not the defense's
3 burden to do anything. And if you were in
4 Mr. Ray's shoes, you don't have a crime lab. Okay?
5 You don't have the crime lab with criminalists
6 sitting there waiting in the lab coats to do
7 anything you want.

8 And, secondly, it's not your burden.

9 And, third, this is this much out of
10 hundreds of square feet. So all of that's gone.
11 What are you going to do about that? What's the
12 excuse? What's the excuse? What's the
13 explanation? Ask the government hey, what's the
14 explanation? Why don't you look at your own
15 evidence?

16 Ladies and gentlemen, that in and of
17 itself, in and of itself, is enough for you to find
18 Mr. Ray not guilty. In and of itself that's
19 enough. Ask the government when they get up here,
20 hey, what do we pay those folks for? What do we
21 pay all these criminalists and doctors for? What's
22 that about?

23 This is your system, ladies and
24 gentlemen. It's yours. You own it. Founders gave
25 it to you. They gave you those. This courtroom is

1 yours. They gave it to you. Is this what you
2 want?

3 Your Honor?

4 THE COURT: Time for the recess. Ladies and
5 gentlemen, we will take the noon recess at this
6 time. As I keep reminding you, you have to abide
7 by all of the rules of the admonition at this time.
8 And one of those rules is that you cannot
9 communicate even among yourselves about the case in
10 any way. Cannot do that until the jury actually
11 goes to deliberate after the closing arguments are
12 over.

13 So please reassemble at 1:20, about an
14 hour and 15 minutes.

15 I'm going to ask the parties remain just
16 a minute. Thank you.

17 (Proceedings continued outside presence
18 of jury.)

19 THE COURT: The record will show the jury has
20 left the courtroom.

21 I just wanted to mention that I know
22 Heidi gave you both a note from a juror. This
23 juror did not want to address anything. I want to
24 make sure you both have it. I'm going to redact
25 the identifying information. That will be sealed.

1 But there will be an unredacted version of the note
2 in the file.

3 Any comment, Ms. Polk?

4 MS. POLK: No, Your Honor.

5 THE COURT: Mr. Li?

6 MR. LI: No, Your Honor.

7 THE COURT: We're in recess.

8 Thank you.

9 (Recess.)

10 (Proceedings continued in the presence of
11 jury.)

12 THE COURT: The record will show the presence
13 of Mr. Ray, the attorneys and the jury.

14 Mr. Li.

15 MR. LI: Thank you, Your Honor.

16 Good afternoon, ladies and gentlemen.

17 Once again, thank you for your attention and all
18 the care that you've put into this case. I want to
19 tell you I really appreciate it. I'm sorry I've
20 gone on so long. There is a lot that we've covered
21 the last four months.

22 The reality is when I'm done, Ms. Polk is
23 going to get up and have a chance to argue again.
24 That's as it should be since she has the burden of
25 proof. The state gets to come up and tell you

1 why -- what it thinks about everything I've said.

2 And that's as it should be.

3 As I stand here -- you know -- I'm always
4 thinking should I answer this question? Should I
5 answer that question? Should I anticipate this?
6 Should I anticipate that? And that's why I've got
7 to cover all this. Because I can't -- I don't know
8 what she's going to say.

9 So I've got to be thorough, and I've got
10 to make sure that you all hear the evidence that
11 was adduced at this trial. So I appreciate the
12 time that you've spent with me and the attention.
13 Let's put that out there.

14 Now, where we left off was we were
15 talking about the Hamiltons and their testimony and
16 whether you can rely on that testimony beyond a
17 reasonable doubt, whether that testimony could get
18 all the way over here and allow you to ignore all
19 of this. That's what we're talking about.

20 And we were talking about whether the
21 state in its investigation perhaps didn't do all of
22 the things that it could have done to give you all
23 the truth, whatever it was, whatever the truth was.
24 That's where we were. Whatever it was.

25 And where I ended was that the state has

1 robbed each and every one of you of the truth, of
 2 the ability to determine what the actual truth was,
 3 whether by inadvertence, whether because they just
 4 didn't feel like looking at it, whether because --
 5 whatever the reason. Whether it's because of these
 6 cameras that we have here, whether it's because
 7 Mr. Ray is a public figure or we don't like what he
 8 thinks.

9 Whatever the reason, we now, ladies and
 10 gentlemen -- you all after four months of sitting
 11 here listening to evidence about Samurai Games,
 12 about Vision Quests, about vegetarian diets, about
 13 rehydrating people who have passed away, about what
 14 distance a log is from the gate of a sweat lodge
 15 when they have a computer program that tells you
 16 what distance it is and they've known all along.
 17 Remember that fight? Or whether the guy on this
 18 EMT tape is an EMT. This organophosphates tape.

19 We spent all that time on that issue for
 20 four months and these kinds of issues. But what we
 21 don't have, what we don't have -- and this is
 22 because the state for whatever reason didn't keep
 23 it. What we don't have are things -- blood, soil,
 24 tarps. I'm sure you can think of more. What we
 25 don't have is the ability to determine exactly what

1 happened that night. That's what's been robbed
 2 from all of you.

3 And I'm not saying that this is
 4 intentional or that this is -- I don't know. What
 5 I do know is we don't have it. We don't have it.
 6 And when we started this argument, when we started
 7 this argument, the state was, well, the defense
 8 hasn't shown you anything. That's the shoe on the
 9 wrong foot. You know? That's a shoe on the wrong
 10 foot. The state hasn't shown you.

11 And when I use some humor sometimes to
 12 talk about the Hamiltons and the testimony that
 13 they want -- the state wants you to believe, it's
 14 not because the situation is funny. It really
 15 isn't. I understand that. It's not funny. But
 16 sometimes humor can reveal the deeper tragedy.
 17 Sometimes humor can show you what's really
 18 happening here is wrong.

19 And so if I've offended anybody by making
 20 light of some of the testimony that you heard, it's
 21 not because I want to be mean to people or anything
 22 like that. It's because sometimes the only way we
 23 can face something as wrong as what we're seeing is
 24 to show some of the humor in it. And if I've
 25 offended anybody, I apologize.

1 What you saw in this courtroom for four
 2 months is wrong, flat out wrong.

3 Let me show you another thing. Remember
 4 I said at the start of this argument and the start
 5 of this trial, I have not told you -- you've seen a
 6 lot more detail about what I said on March 1. But
 7 it has not changed. I'm telling you what I said we
 8 would show you on March 1. And it is the same
 9 thing. That chart is just as useful today, as
 10 poorly drafted and written as it is, as it was four
 11 months ago.

12 And so at the beginning of this I told
 13 you another thing you -- that the state had failed
 14 to prove, another thing that's just wrong, wrong,
 15 with this case. The state has failed to prove
 16 beyond a reasonable doubt -- and you all, when you
 17 listen to Ms. Polk argue, you keep these words in
 18 mind, because this is the actual law. Don't let me
 19 drop off a piece of this because the whole thing
 20 here is the law. Okay?

21 And so I have put this book over here,
 22 but really these instructions go here too. These
 23 instructions are the important parts of this book
 24 right here. So when you hear her arguments, you
 25 make sure that you keep in mind the whole

1 instruction, not a part of it, the whole thing.

2 And it says in order to prove Mr. Ray
 3 guilty of manslaughter, you must find that the
 4 crime of manslaughter requires proof, and I'm going
 5 to say it, beyond a reasonable doubt, that the
 6 defendant was aware of. Okay? Knew. And showed a
 7 conscious disregard. That means a known -- a
 8 conscious, that he knew, and that he disregarded,
 9 of a substantial and unjustifiable risk that his
 10 conduct would cause another person's death.

11 That means he has to know that what he's
 12 doing will cause another person's death,
 13 substantial and unjustifiable risk that it will
 14 cause somebody's death.

15 It's not just was there a risk. Are you
 16 aware of risks associated with things? Because if
 17 that was true that -- in this country if you are a
 18 mountain guide and you climb some folks up
 19 Mount McKinley and somebody dies, you're guilty
 20 because you know that there is risks that people
 21 are going to go up climb a mountain, and people do
 22 die.

23 Or the argument that the state has made
 24 that if there is a waiver form, if there is a
 25 waiver form, that shows that whoever wrote the

1 waiver form is conscious and knows of a
2 substantial -- substantial and unjustifiable risk
3 of death. Okay?

4 I showed you just as a demonstrative.
5 It's not in evidence. But the City of Phoenix,
6 they put on golf lessons for kids. Okay? If your
7 kid -- you're going to do a golf lesson for your
8 kid, you got to sign this waiver. And the waiver
9 says hey, people can die. That's literally what it
10 says. He can be paralyzed. He can die. There can
11 be negligence. Things can happen. Okay.

12 On the state's theory that means that the
13 City of Phoenix, because it has said golfing for
14 your kids has a risk of death and you should sign
15 this waiver, that means because the City of
16 Phoenix -- you know -- asks people to sign this
17 waiver, that means the City of Phoenix is aware and
18 is consciously disregarding a substantial and
19 unjustifiable risk of death. The waiver proves
20 that. That's what the state said in its closing --
21 in its argument just yesterday. That, as you all
22 know, is just not true.

23 I'm going to talk about three things.
24 First thing I'm going to talk about is the law,
25 about the accidents and hindsight. We're going to

1 talk about the law and accidents and hindsight.

2 The second thing is about the 2008 sweat
3 lodge ceremony, the 2008 sweat lodge, and what that
4 tells us about what happened and what the situation
5 was.

6 And a third thing I'm going to talk to
7 you about is the evidence from inside the sweat
8 lodge and -- in 2009 and what sort of assumptions,
9 innuendo, and just guesswork the government wants
10 you to make from what they say they -- what they
11 say happened inside the sweat lodge.

12 Each of these areas, each of these areas,
13 is going to show you that the state has not reached
14 that burden at all. The state has not reached this
15 burden at all. And then because the state now
16 wants you to hear about -- you saw a form about the
17 lesser included offense of negligent homicide, I'm
18 going to need to talk about that too.

19 I'm going to ask you something. Do they
20 think they've not proven the actual crime they
21 charged? If they haven't, why did they charge it?

22 The first thing I want to talk about is
23 accidents and hindsight. So here's the reality:
24 Everything we do in life, every single thing we do
25 in life, dangerous or not, has a risk of accidents.

1 They happen all the time. Every day of the week
2 people have accidents all over this country. And
3 they're not criminal. Accidents are not criminal.

4 This case that we're -- we've been in
5 court about for the last four months is an
6 accident. And there has never been a case like
7 this ever. Think about that. Where consensual
8 adults are doing something that's legal -- they're
9 not having knife fights or shooting at each other
10 or doing stuff like that, which is typically
11 what -- driving drunk -- you know -- at 150 miles
12 an hour with a blood alcohol -- you know -- through
13 the roof -- we're not talking about that.

14 We're talking about consensual adults
15 getting together, doing something they want to do,
16 and an accident happens. And the State of Arizona
17 jumps in and wants to prosecute people for criminal
18 conduct, wants to reverse engineer what happened
19 and show you, oh, here's all the things they could
20 have done. And that would be what makes it not --
21 that's what makes it not just an accident but a
22 crime.

23 I'm trying to find it. It's
24 Ms. Gennari's lawsuit. Okay. That's how you deal
25 with accidents. People have lawsuits. I'm going

1 to give you a couple of examples of this. Let's
2 say you drive to work every day. Let's say you
3 don't speed. You don't drive drunk. You don't do
4 those illegal things. You just drive to work.

5 And every day when you're driving, you
6 hear a clunking noise in your drive train. Okay?
7 You think boy, I better take care of that someday.
8 Might be a problem with the drive train. Something
9 going on in there. And you don't. You just don't
10 take care of it.

11 And bam. It breaks. Wheel breaks off,
12 goes flying out onto the 17. The axle breaks,
13 wheel goes flying off. And instead of luckily not
14 hitting anybody, it hits a minivan going north to
15 Sedona, and people get hurt and killed. Okay?
16 That happens.

17 I was driving home from work one day, and
18 my belt broke. And all the power in my car shut
19 off. All of it. The steering, the breaks. It
20 just grenaded the entire interior of the engine
21 compartment. And I had to drag my car over to the
22 side going 80 miles an hour. I was going 80 miles
23 an hour. Going from about 80 miles an hour down to
24 about 40 miles an hour with everything failing and
25 me having to just drag that car all the way to the

1 other lane.

2 And -- you know -- really bad things
3 could have happened. I could have crashed into
4 somebody. Something could have crashed into me.
5 People could have been hurt. People could have
6 died.

7 And here's how that works: We have a
8 civil system that says hey -- you know -- you
9 should have fixed that. You should. There could
10 be a lawsuit. You should have fixed that. And my
11 insurance company and other people have to deal
12 with it. And it will be a tragedy, and it will be
13 horrible. But that's how our system works. You
14 know.

15 We don't have the criminal justice system
16 coming in -- the county attorney, him or herself,
17 doesn't come in and prosecute you because you
18 didn't check on your timing belt or you didn't
19 check on your axle. That's not how it works.

20 The criminal justice system requires a
21 substantial and unjustifiable risk of death.
22 That's a very different thing. And another example
23 I'll give you is the Phoenix golf course example.
24 This is the City of Phoenix. They hire it out to
25 people. You know what. Things do happen.

1 Sometimes there are people on the golf course that
2 shouldn't be there, and they hurt people. And that
3 happens. Okay?

4 But that's not the same as a criminal
5 case where there is a substantial and unjustifiable
6 risk of death. That's not how our system works.

7 And here's why: In a civil case your job
8 is to reverse engineer an accident. You're
9 supposed to sit there, and you're supposed to
10 think -- you know -- did Mr. Li -- did he know that
11 his belt was going to break? Should he have done
12 something about that? Did he -- did he maintain
13 his car well enough? Did he do whatever? Should
14 he have done it? Did the City of Phoenix know
15 about this? Should they have fixed it. Should
16 they have done that? Should they have closed the
17 gate? Whatever. More guards? Better medical
18 care? Should they have done that?

19 And you reverse engineer the crime --
20 sorry. The accident. And you decide, okay. So
21 now that we know all this, the jurors, another
22 jury, not you, the jurors sit there and figure that
23 out. And then they say well, okay. Maybe they
24 should have. Maybe they shouldn't have. And now
25 let's decide. Is there some sort of compensation

1 that should be given?

2 That's the normal way our system works.
3 And you heard from witness after witness. You saw
4 Ms. Gennari's lawsuit. That's what people do and
5 have done in this case. That's how our system
6 deals with accidents.

7 But a substantial and unjustifiable risk
8 of death is different. Okay? Again, you don't
9 have to listen to me. Just look at the law. In
10 civil cases the defendant can be liable if the risk
11 of harm caused by his conduct was merely
12 unreasonable. Okay? That means you blew it. You
13 should have done this. You could have done this.
14 You didn't.

15 We've reversed engineered the crime.
16 Here's 12 different places we can say things you
17 should have done, steps you should have taken,
18 words you should have used, examinations, whatever.
19 Here's all the things you should have done. It's
20 unreasonable. You shouldn't have done that.

21 And now you and your insurance company or
22 whoever, you alone or whatever, you're going to
23 have to pay some damages. That's what a civil case
24 does. So it has to be -- in a civil case it can be
25 merely unreasonable.

1 In a criminal case the standard is
2 higher. The risk of death must be substantial and
3 unjustifiable. "Substantial" means likely. Most
4 of your manslaughter cases involve swinging knives
5 at people. Okay? Shooting a gun. You don't
6 intend to hit the person. Shoot near them. Shoot
7 into the house, something like that. Stabbing
8 somebody, driving drunk at 150 miles an hour.
9 That's substantial and unjustifiable risk.

10 Mistakes are not. Merely unreasonable
11 conduct is not. And, again, for the civil case,
12 you just got to get here, 51 percent. In a
13 criminal case, you got to get all the way over
14 here.

15 The other thing is that the risk has to
16 be a gross deviation, such as disregarding it was a
17 gross deviation from the standard of conduct that a
18 reasonable person would observe in the situation.

19 And a gross deviation, just so you know,
20 is conduct -- is one that may be characterized,
21 among other terms -- by such terms, among others,
22 as flagrant, extreme, outrageous, heinous, or
23 grievous. The deviation from reasonable conduct
24 must be significantly greater than the mere
25 inadvertence or heedlessness that is sufficient for

1 civil negligence.

2 This is law. It's a little dry. And,

3 again, it's after lunch. But this is critical.

4 This is not a civil case. It's got to be grievous.

5 What's grievous? Swinging a knife at somebody.

6 Okay. Maybe you don't mean to kill him. But

7 swinging a knife at somebody. That's grievous.

8 That's flagrant. That's heinous.

9 Driving drunk at a hundred miles an hour.

10 That is grievous because -- you know -- all of us

11 know what happens. Shooting. That's grievous.

12 That's heinous.

13 Making a mistake, having an accident,

14 that's mere civil. That's a civil issue. That's

15 not grievous, heinous, flagrant, outrageous. And

16 surely it's not by a reasonable doubt.

17 Now, before I go further, define some of

18 the terms, here's the other thing you need to

19 consider: I could have sat right down. Maybe you

20 wish I had. But I could have sat right down right

21 before lunch. Okay? Because the first thing you

22 would have to find is that Mr. Ray actually caused

23 the deaths. So if you don't find that beyond a

24 reasonable doubt, you don't find that beyond a

25 reasonable doubt, all this stuff here and the

1 state's attempt to explain it away, if all of that

2 doesn't convince you beyond a reasonable doubt that

3 Mr. Ray caused the deaths and if there is a real

4 possibility that Mr. Ray didn't cause the deaths,

5 then I could have sat down right there, and you

6 could have returned your verdict right then. Okay?

7 But because Ms. Polk gets to come back

8 here again, I got to deal with this. All right? I

9 just want to make that clear. There is two

10 elements. One is that he actually caused it. And

11 now we're talking about the mental state. What did

12 he know? What did he not know?

13 Okay. So this is the standard.

14 Flagrant, extreme, outrageous, heinous or grievous.

15 That's the conduct we're talking about. Gross

16 deviation.

17 So the state in an effort to sort of get

18 around all this, and, frankly, the facts of this

19 case, which is -- which are that you heard from

20 witnesses repeatedly who were sitting right next to

21 the folks who passed away, who didn't know that

22 something was wrong or that people were dying. I

23 didn't mean that. That people were dying.

24 They were not -- all the people, 50

25 some-odd people -- reasonable, sober, decent

1 folks -- did not know that people were dying.

2 Okay? And to get around the idea that, okay, well,

3 the only one who is responsible for not knowing is

4 Mr. Ray, they've tried to say well -- you know --

5 it's the ceremony itself. It was intended -- you

6 heard the argument. It was intended to push people

7 right to the edge of death, to make these folks

8 actually have heat stroke.

9 That was the state's argument, that that

10 was the point of this whole ceremony is to push

11 people to the point of death. And Mr. Ray intended

12 to do that. That's what he wanted. The only thing

13 he didn't do is intend to have them actually die.

14 You heard the state make that argument.

15 So in order to get around the idea that

16 nobody knew and nobody could have known -- because

17 you got 50 some-odd reasonable people sitting

18 there, including doctors. Okay? Dr. Armstrong.

19 You remember her? She was a pretty competent,

20 sober lady.

21 Dr. Nell Wagoner. She was a pretty

22 competent lady. And she sat right next to the

23 door, basically, about three or four feet away from

24 Mr. Ray, five feet from Mr. Ray. So every person

25 who is being brought out in front of Mr. Ray is

1 also being brought out in front of Dr. Wagoner, who
2 is a doctor.

3 So in order to get around that, the state

4 wants to argue to you that just the sweat lodge

5 itself was designed, the whole point of the

6 ceremony was designed, to create heat stroke. And

7 that's just not what happened. And certainly not

8 by any stretch of the imagination, but for sure not

9 beyond a reasonable doubt. Okay?

10 And there is two ways you're going to

11 know this. One is from the witnesses you heard

12 talking about 2008. And the second is the

13 pictures, the pictures of 2008 that I showed you,

14 with Ted Mercer, everyone single one I showed you,

15 good, bad and the ugly. Remember me saying that,

16 the good, bad and ugly?

17 So let's talk about a few of the folks

18 who were there. So you heard from Mark Rock. Now,

19 Mark Rock was there in 2008, and he says yeah,

20 there were some problems. You know, couple people

21 weren't feeling so well. I didn't feel so well. I

22 got out. I recovered quickly. Okay?

23 And then what does he do? What's he do?

24 Does he say oh, my God, that was such a horrible

25 incident, everybody was pushed to the point of

1 death -- you know -- it was 20, 30 people needed to
2 be helped? It was crazy -- you know -- like Debbie
3 Mercer said?

4 What does he do? Signs up. He wants to
5 be a volunteer. Hey, I'd like to help out. How
6 about Debbie Mercer? Remember, because he's a
7 Dream Team member. He decides to sign up.

8 Debbie Mercer. Debbie Mercer is there
9 2007, 2008, 2009. She said 2007, 2008, exactly the
10 same, and it was a disaster. And it was exactly
11 the same as 2009. People were dying, and it was
12 terrible. What does she do? She just does it.
13 2007, 2008, 2009. So does Ted Mercer.

14 And here's a picture. This is
15 Exhibit 862. There's Debbie Mercer. Now, you
16 can't see it too well. Okay? And we had a
17 discussion with her. And she's smiling there.
18 Okay? So this is right after the event in 2009
19 when she's telling us -- when she told us all here
20 this was -- people were dying, there was medical
21 distress, emergencies. And she's sitting there
22 spraying water all over the place, and she's
23 smiling. Now, maybe she isn't smiling. Maybe I
24 got it wrong. You guys can decide for yourself.
25 It's 862.

1 But the point is people are taking
2 pictures. It's not war photography. This is just
3 people taking pictures, snap shots. There is a
4 whole bunch of these exhibits. I showed you every
5 single one. Ask yourself why did I show you every
6 single one.

7 Now I'm going to show you another one
8 that's -- you know -- when I said good, bad and
9 ugly. Here's Barb Waters, Exhibit 869. She is
10 wiped out. Okay? Wiped out. I've seen pictures
11 of a buddy of mine's kid after a track and field
12 event. He looks like that. Wiped out.

13 And what was the testimony? She went
14 back -- she got brought back to her room. She
15 recovered. And you know what happens? The next
16 year there she is. She's one of the Dream Team
17 members.

18 So there is a big difference, folks,
19 between this stuff: Death, coma, pinpoint pupils,
20 foaming of the mouth. There is a big difference
21 between that and being wiped out. And for sure
22 there is a big difference -- there is a real
23 possibility that it's not substantial and
24 unjustifiable risk of death. There sure -- there
25 is a whole lot of reasonable doubt about whether

1 based on those facts you can find that there was a
2 gross deviation that, as the state alleges, Mr. Ray
3 intended for people to have heat stroke. There is
4 a big difference.

5 And you know what. If the state has
6 something to say about Ms. Waters and -- you
7 know -- what her real condition was -- you know --
8 why she volunteered to come back, call her. Just
9 give her a call. We heard from the six folks,
10 seven folks, from Angel Valley. How about we call
11 her and say hey. Look what happened to you. Why
12 are we having Debby Mercer talk about her? I mean,
13 no offense, but she's not a doctor. She doesn't
14 know.

15 Why aren't we hearing from Ms. Waters if,
16 as the state wants you to believe, that it was a --
17 that she was at the point of death, basically? Why
18 aren't we hearing from her?

19 There is some people getting cooled off.
20 This is what happens after the sweat lodge. They
21 come out and they get sprayed with water. They get
22 cooled off.

23 There's more picks. Look at his face.
24 Okay? This is the same incident, the same day,
25 Exhibit 871, where, according to Debbie Mercer,

1 lying all around are casualties. And so what are
2 people doing? They're taking pictures. And you
3 got this guy smiling here. And look. You got --
4 see these folks? These folks are taking pictures.
5 The other guy is taking pictures. And then you
6 have two people lying here.

7 I want you to focus on these two people
8 lying here. If I didn't show you all the pictures,
9 you might think wow. Those people aren't doing so
10 well. Look at them just lying there -- you know --
11 still. Except those are the same people. 872.
12 There is the lady spraying people with a hose.
13 873. There is that other lady who was lying there,
14 didn't look so great -- you know -- flat on her
15 back. There she is smiling.

16 And I want to make a little point about
17 these pictures. Okay? Here you have people
18 getting sprayed off, getting cooled off. Remember
19 how I was talking about there was a -- I don't
20 really understand what the state's story is on
21 dehydration? I'm going to also tell you I don't
22 really understand what their story is about cooling
23 off. Okay? Because the Mercers, Debbie Mercer,
24 wanted you to believe that this was 40 minutes
25 after the fact so that she could say all the bad

1 pictures, everything bad that happened, is not on
2 these pictures.

3 You know, the reason why you're not
4 seeing pictures of all the bad things that happened
5 is because they waited 40 minutes or so to take
6 pictures. All right?

7 But here's the question: They're
8 spraying each other for 40 minutes? They're
9 spraying each other for 40 minutes? Why aren't
10 they freezing? If people's temperatures can cool
11 down like that, two cups of water, you can go from
12 105 to 99 or 97, why are these folks still spraying
13 each other? What's the state's story on that
14 beyond a reasonable doubt? What's the state's
15 story on cooling off?

16 Or is it just that depending on what we
17 need to prove -- you know -- if we've got to say
18 hey, you know what. Dehydration doesn't matter,
19 then it doesn't matter, except for when it does.
20 Cooling off, cooling off. When you got all these
21 pictures, actual pictures, of people spraying each
22 other with hoses, that's not the same as cooling
23 off. That's just people playing with hoses. Okay?

24 But two cups of water -- you can just
25 assume that people who had heat stroke at 104, 105

1 degrees, we've got the water. If you spray it
2 there, they've dropped all the way down to these
3 kinds of temperatures. What's the state's story?
4 Ask them. What's the story? Can they make it fit
5 together?

6 So here are some more folks from the same
7 ceremony. Okay? This is Exhibit 875. This one
8 here is Hermia Nelson. She's the Chinese lady.
9 Remember Mr. Mercer and I having a conversation
10 about that.

11 What's the state's story about that? Was
12 she in a bathtub -- you know -- cramped up in a
13 fetal position in 2007 or 2008? First it was 2008,
14 and then well, there is these pictures. There she
15 is. Doesn't look like she got all cramped up and
16 is in a bathtub in those pictures. Then it became
17 2007. Well, then 2007. Let's assume it's 2007.
18 Fine. All right.

19 So she's back here as a Dream Team
20 member. And they're pointing and smiling and
21 taking pictures. And this is the mass-casualty
22 incident that -- this is the pushing people to the
23 point of heat stroke that the state is saying was
24 Mr. Ray's intention. These are some ladies. These
25 folks were pushed to the point of death. And then

1 there is this woman who was also pushed to the
2 point of death. Looks like Jeanne Armstrong.

3 This is the state's argument: That the
4 intention was to push people to heat stroke. Now,
5 I show this picture because it's worth a thousand
6 words, but also because, you know what, here's the
7 reality: People are really proud when they get out
8 of that sweat lodge. Okay? So Jeanne Armstrong
9 does this when she gets out of the sweat lodge
10 because they feel like they have accomplished
11 something.

12 And they don't know in 2009 what actually
13 happened inside. Dawn Gordon crawled out and she
14 felt proud. You heard her testify. And you know
15 what. I got to tell you, there is a degree to
16 which -- you can decide for yourself. There is a
17 degree to which, I think, she felt a little ashamed
18 that she was feeling proud, a little embarrassed to
19 tell you that when she came out she was feeling
20 proud. The reality is she didn't know. Nobody
21 knew.

22 So the point I'm making about this event
23 is that it's tough. Okay? People get wiped out.
24 It's really tough. But then some of them, many of
25 them, have a peek experience where they accomplish

1 something and they get to feel like they've done
2 something, and they accomplish something.

3 But the one thing this doesn't show
4 beyond a reasonable doubt for sure is that there
5 was a substantial and unjustifiable risk of death
6 and that there was a gross deviation, heinous,
7 flagrant, extreme, outrageous. That's the one
8 thing -- you can look at these photos and decide
9 whatever you want to decide. But I'll say to you,
10 the one thing it doesn't show is a heinous,
11 grievous, extreme, outrageous, substantial,
12 unjustifiable risk of death. That's not what it
13 shows.

14 And, ladies and gentlemen, as much as
15 Ms. Polk, pardon me, the state, told -- or got
16 these witnesses -- did you have -- were there
17 safety precautions in place? As many times as
18 people like Beverly Bunn said no, that's just -- I
19 mean, it's not true.

20 Now, did the safety precautions fail?
21 Yeah. I mean, obviously. Right? But let's go
22 through some of them. And I'll submit to you, if
23 you can find a sweat lodge anywhere that has these
24 kinds of precautions in it, I'll be surprised. Any
25 sweat lodge anywhere.

1 Okay. So people were repeatedly told you
2 got to hydrate, hydrate, hydrate. How many times
3 did we hear that? Hydrate, hydrate, hydrate.
4 Because dehydration matters -- okay? -- except for
5 when the state thinks it doesn't. Dehydration does
6 matter. Hydrate, hydrate, hydrate.

7 Are there buckets and hoses to cool
8 people off? Okay? Because -- you know --
9 temperatures -- you get hot in a sweat lodge, and
10 you need to cool people off. There was a recovery
11 station -- you know -- like at a 10K or a jog/walk
12 where you have fruit and vegetables -- fruit and
13 Gatorade and those kinds of things so people can
14 rehydrate and get electrolytes.

15 This is what everyone thought it would be
16 like, a 10K or a marathon or something like that,
17 really hard, really hard but doable. And you got
18 to push to get through it. As Mr. Ray said, it is
19 really hard. It's going to be hot. It's going to
20 be really hot.

21 Now, I'm going to ask you guys, you all,
22 to listen to the actual tape, not the clips.
23 Because when Mr. Ray says, you're going to feel
24 like you're dying and you got to surrender to it
25 and all that, you all know he's not saying you all

1 need to die. He's not saying that. Because what
2 got cut out of the clip is the part where he
3 says -- and that's why it's such a great metaphor.
4 That's why it's such a great metaphor and a
5 reference point to show you what you can do. You
6 got to face it, face it, and overcome it. He's not
7 saying die.

8 They had CPR training for Melissa
9 Martin -- Melinda Martin and other JRI people.
10 Now, Melinda Martin -- you remember her. She was
11 employed by JRI. Obviously she didn't want to do
12 this. I mean, she didn't want to be involved in
13 this horrible tragedy. Of course.

14 But the point is she was trained to do
15 CPR. And what happened was she did CPR. And you
16 heard the EMT's who showed up to the scene. And
17 they said you bet. That was effective CPR. They
18 said it multiple times. I saw effective CPR being
19 done. Well, you know who was doing it, among
20 others? Melinda Martin. Effective CPR.

21 She also treated the burn for Mr. Caci.
22 Now, Fawn Foster wants to take credit for the whole
23 thing. I told them to tell them -- you know -- the
24 nurse who was there -- oh. By the way, there was a
25 nurse outside who was not very good and doesn't

1 know what she's doing and all that sort of stuff.
2 But I knew because I'm Fawn Foster. And
3 I'm telling you I knew what to do. And the nurse
4 didn't know what to do. And Melinda Martin, who's
5 trained in CPR -- they didn't put any bandages on
6 him. She actually did. Melinda Martin put
7 bandages on his arm. You saw in the EMT records
8 his arm had been bandaged. Okay?

9 So what is it? Was she trained or was
10 she not trained? What was it? She was trained.
11 As I said, there were volunteers outside, including
12 a nurse. She's a nurse -- Lisa Rondan.

13 Now, as I said, the Angel Valley folks
14 said well, she wasn't much of a nurse. You heard
15 Debbie Mercer say she didn't know what to do. You
16 know, the nurse, the so called nurse, didn't know
17 what to do. And I took over and I told her what to
18 do. So I called 9-1-1. She didn't even know to do
19 that.

20 But you heard the 9-1-1 tape. And the
21 state played it in its opening argument and played
22 it in this court. It's Exhibit 133. On that tape
23 you can hear Debbie Mercer say, the nurse told me
24 to call 9-1-1. The nurse told me to call 9-1-1.
25 That's what nurses do.

1 We're not saying that she was a
2 specialist in organophosphate poisoning or a
3 specialist in heat stroke. She's a nurse. She
4 helps people who are sick. And she was outside --
5 she was somebody outside monitoring the situation.
6 And there were volunteers inside.

7 You remember the four corners that I
8 showed you where there were folks at them? And
9 their job was you will assist participants as they
10 enter and exit the sweat lodge. If you're inside
11 the sweat lodge, you must remain alert and ready to
12 help the entire time. If you are outside the sweat
13 lodge, be present and ready to quickly and
14 immediately do what is necessary to assist anyone
15 coming out of the lodge.

16 So you have people on the outside,
17 including a nurse. You have people on the inside
18 whose job it is to remain alert, including Mark
19 Rock, to remain alert and to help out if needed
20 from the inside.

21 Now, this is why the various Dream Team
22 members -- the people who were next to them were
23 happy. So, for instance, Laura Tucker was happy to
24 have Liz Neuman next to her, because she knew that
25 Liz Neuman was a volunteer, had done this five

1 times before. That was her testimony.

2 And Mark Rock was selected because he had
3 done it before. And so he knew to lift the flap
4 between rounds to get air in, to get a -- to cool
5 things off. So that's why you have people
6 volunteer on the inside. To help out.

7 Now, obviously, obviously, something went
8 horribly wrong. Obviously. Something went
9 horribly wrong. And this system that was designed
10 to help people and to make sure that they got
11 through a tough event safely failed. And if you
12 reverse engineer it, I'm sure you can find places
13 where things could have been done a whole lot
14 better.

15 And some civil juries someday might just
16 do that, might go look at this issue. But this is
17 a criminal case. And we're talking about
18 substantial and unjustifiable risk of death beyond
19 a reasonable doubt and a gross deviation, a
20 heinous, grievous, flagrant deviation. Those are
21 different things.

22 And, finally, the final safety
23 precaution, which contradicts what the state says
24 repeatedly about being -- you know -- folks being
25 told to ignore the symptoms, the signs, their

1 bodies were giving off and not to help each other
2 out. What absolutely contradicts it is Mr. Ray's
3 pregame speech to them where he says all these
4 things. It's going to be hard. It's going to be
5 terrible. It's going to be hot. It's going to be
6 horrid.

7 It's like the climbing guide I had saying
8 it's going to be cold. You're going to feel
9 miserable. Getting everybody in the right frame of
10 mind so they understand what they're dealing with.

11 And then he says, so if you need to
12 leave, then you need to. And you're right here,
13 and you can duck your way out. And you heard it a
14 bunch of times. I'm not going to read you the
15 whole thing. Basically, he says, you need to get
16 out, here's how you do it. Be careful. So the
17 point is people were free to go. But if they
18 needed to leave, they could leave. Take care of
19 yourself.

20 Nobody knew that people were going to
21 die. Every witness the state called said so.
22 Every witness the state called. So, again, with
23 the state's own evidence every witness the state
24 called fell way below reasonable doubt. Every
25 witness said, I didn't know folks were dying. I

1 didn't know.

2 Take Liz Neuman. Laura Tucker was
3 sitting right next to Liz Neuman, right next to
4 her. Liz Neuman was coaching her throughout the
5 ceremony. You can do this. They were tapping on
6 each other, making sure everybody was okay.

7 At some point Laura Tucker became
8 concerned about Liz Neuman because of the things
9 that she told you. She went toward the fire, and
10 then she came back, and she was leaning against the
11 legs. And she called out to Mr. Ray, and she said,
12 James, it's Laura here. I have concerns about Liz.

13 James said, she's done this before. She
14 knows what she's doing.

15 So then Laura Tucker, who is not -- you
16 know -- is not going to just stop there, says,
17 well, I wasn't satisfied with that. I decided I'd
18 ask Liz. And so here was the testimony:

19 Question: What did you do after Mr. Ray
20 responded in the way that he did?

21 Answer: I decided I would ask Liz. So I
22 reached up my left hand. I could reach her
23 shoulder. I touched her on the left shoulder to
24 get her attention. And I asked her, Liz, are you
25 okay?

1 Did Liz respond?

2 She did.

3 And what did she say?

4 She said, yes.

5 This is in the last round. And then she
6 said -- asked her another question.

7 Question: Did Liz respond?

8 Answer: She did.

9 Question: What did she say?

10 Answer: She said, no.

11 How can you know what's in somebody
12 else's mind or body if they're telling you I'm
13 okay? And you heard -- this is one of the very
14 emotional -- and there were many emotional moments
15 in this trial. But one of the very emotional
16 moments in the trial when she was asked, you didn't
17 do anything more because you didn't see the risk;
18 is that correct?

19 And Laura Tucker, who was a very sober,
20 professional lady, who I think something to do with
21 cars. Very professional lady. And you remember
22 her. She said, I went by what she told me. I went
23 by -- you know -- initially when I spoke out to
24 Mr. Ray, I still wasn't satisfied. So I asked her.
25 And I went by what she said. I have no -- I had no

1 idea there was any cause for immediate concern
2 beyond that. If I had, I would have done
3 everything within my power to stop it and get her
4 out. And that's what I wish happened.

5 You know what, ladies and gentlemen,
6 that's what we all wish happened. Okay? We all
7 wish that happened. But nobody knew. As far as
8 everyone knew, Liz Neuman was okay and didn't need
9 to come out. She'd done this five times before and
10 because she said so.

11 Now, one thing you need to know. Laura
12 Tucker -- and I won't jump into the box with you
13 guys. But Laura Tucker was this close, right next
14 to Liz Neuman. Why are we hearing from the state's
15 witnesses who say they know about conversations and
16 who was talking to who and what was meant by
17 everything that was being said who were over here
18 in the dark? And I'm not going to walk out of the
19 courtroom again. But why are we relying on people
20 who are literally outside of the courtroom? Why
21 does the state want you to say oh, you know what?
22 I believe beyond a reasonable doubt all those
23 conversations that people who were 20 feet, 15 feet
24 away, but I don't want to believe -- you shouldn't
25 believe the person who literally can touch -- who

1 is touching one of the folks who passed away? Why
2 is that? Can you do that?

3 James Shore. Nobody knew Mr. Shore was
4 dying. No one. The state's own witnesses
5 testified that Mr. Shore -- very near the end of
6 the ceremony, between the sixth and seventh round,
7 Mr. Shore left his position, helped somebody out.
8 How long did this take? And I'm walking in a
9 straight line, and he's walking like that. Help
10 somebody out. 23 feet, all the way to the door,
11 and handed that person outside and then went all
12 the way back in. How long did that take?

13 And every single person, including
14 Mr. Ray, saw a man help somebody out then go back
15 in. It's not just Mr. Ray. It's every single
16 other person, including Nell Wagoner, a doctor;
17 Jean Armstrong, a doctor; and every other sober,
18 reasonable -- and by "sober" I don't mean not
19 drunk. I just mean reasonable. These people saw
20 the same thing. Now, how would you know that that
21 person was about to die?

22 And you have Dawn Gordon, who was on the
23 stand. And she testified that she saw, she saw --
24 she testified that she saw Mr. Shore up on his
25 elbow between the eighth and ninth round saying

1 sweet things to Kirby Brown. You can do this.

2 Come on. You can do it.

3 And Dawn Gordon is, again, this close,
4 this close. And she sees him. And she sees him up
5 on his elbow saying, hey, you're going to be okay.
6 We're going to make it. Why doesn't the state want
7 you to listen to that testimony and believe that
8 testimony and believe instead testimony from people
9 who are over here, over here, over here, out the
10 door, and why does the state think that that proves
11 it beyond a reasonable doubt? It doesn't.

12 Now, Ms. Brown, Kirby Brown. Nobody knew
13 she was dying. Nobody. In fact, throughout the
14 last few rounds, she was yelling out, we can do it,
15 we can do it, we can do it; so much that folks had
16 to say, be quiet. Okay? Be quiet. How can you
17 believe -- how could you understand that to mean
18 that somebody is dying?

19 So she started to have labored breathing,
20 gurgling sounding breathing, what Ms. Gordon
21 described as you have a cold and she's having a
22 hard time breathing. And that's when -- and this
23 is from the first day of testimony, the very first
24 day of testimony. Melissa Phillips testified.
25 When was it that you heard -- that you said that

1 you mentioned that people were having trouble?

2 I don't know what round it was, but I
3 mentioned several time that the person was having
4 problems breathing and that the person beside
5 them -- and we now know that's James Shore -- said
6 I'm here. It's fine. And -- you know. You decide
7 whether it was James Shore. I'm not suggesting
8 that I know. It's for you to decide.

9 I'm here. It's fine. She's all right.
10 And I trusted that.

11 And the person next to her we know had a
12 male voice. Correct?

13 Correct.

14 Question: But Mr. Ray was at the door.
15 So we know that it was not Mr. Ray who said that;
16 correct?

17 Correct.

18 So we know that it's not Mr. Ray who is
19 saying it's okay. Leave her be. What you hear is
20 somebody who is sitting right next to Kirby Brown
21 saying, I'm here. It's okay. She's fine.

22 And Dawn Gordon -- she didn't know. And
23 Dawn Gordon was touching Kirby Brown. You saw her
24 testify. She was touching Kirby Brown. And she's
25 telling you -- you know -- and you decide for

1 yourselves. But what must break her heart? But
 2 she's the person touching Kirby Brown. And she
 3 says she didn't know. She didn't know. Because
 4 had she known, she would have done something.
 5 But instead the state wants you to talk
 6 to and listen to people who are out of the
 7 courtroom, the other side of the room, all of this
 8 place. And say, oh, those people you should
 9 believe beyond a reasonable doubt that they know
 10 what was in everybody's mind and who was talking to
 11 who and all that stuff when the people who were
 12 literally touching folks who passed away didn't
 13 know.

14 That by itself proves to you that the
 15 state can't meet its burden that Mr. Ray, let alone
 16 the folks actually touching these people, that
 17 Mr. Ray knew that folks were dying. And remember
 18 Mr. Ray is also standing all the way -- sitting all
 19 the way there. And he's talking and chanting and
 20 pouring rocks and doing all those sorts of things.

21 So the state just fails. In addition to
 22 failing to show that he caused anybody to die, the
 23 state failed to show that he knew beyond a
 24 reasonable doubt.

25 Now, normally I would be done here.

1 Okay? But because the state wants you to also
 2 think about the lesser included charge of negligent
 3 homicide, I've got to talk to you about that. And
 4 I know this is hard duty that you all are doing.
 5 But thank you very much. Please bear with me.

6 This is the failure to perceive. So
 7 negligent homicide -- just so we're clear --
 8 okay? -- the word "negligent" in this context, in
 9 the criminal case, is not the same as "negligence"
 10 in a civil case. Negligent in the civil case is
 11 did you mess up? If we reverse engineer
 12 everything, can we figure out different ways that
 13 you messed up?

14 Negligent homicide -- so a lot of the
 15 arguments you hear from the government when they
 16 start saying they should have done this, they could
 17 have had that, they could have had this, that's not
 18 what this statute is about. That's not what this
 19 crime is about. That's a civil case.

20 And if you hear Ms. Polk give you an
 21 argument along those lines, what she's doing is
 22 almost like a plaintiff's lawyer saying -- you
 23 know -- and my client needs money because of that.
 24 Okay? There is a place for that. I'm not
 25 disparaging that. There is a reason our system

1 works. There is a place for that. But this is not
 2 this case and you are not those jurors. Those are
 3 civil jurors.

4 So what you need to find beyond a
 5 reasonable doubt is that the defendant, Mr. Ray,
 6 failed to recognize. So that the negligence, the
 7 grossly negligent thing, is to fail to recognize.
 8 It's not to not have systems or to not -- you
 9 know -- not have enough -- not have an AED or
 10 something like that. That's not what we're talking
 11 about.

12 It's that he failed to recognize a
 13 substantial and unjustifiable risk that his conduct
 14 would cause the death of another. The risk must be
 15 such that the failure to perceive is a gross
 16 deviation from what a reasonable person would do --
 17 observe in the situation.

18 And, again, "substantial and
 19 unjustifiable" is defined in your instructions. In
 20 civil cases a defendant can be held liable if the
 21 risk of harm caused by his conduct was merely
 22 unreasonable. That's where you just -- you blew
 23 it. Okay?

24 We're not talking about that. The risk
 25 of death has to be substantial and unjustifiable.

1 That means likely. That your failure to perceive
 2 that the risk of death is, basically, a forgone
 3 conclusion. It's going to happen.

4 And a gross deviation, as we discussed
 5 earlier, has to be flagrant, extreme -- or can be
 6 characterized as flagrant, extreme, outrageous,
 7 heinous, or grievous. So we're talking not just
 8 inadvertent or heedlessness that is necessary for a
 9 civil case. We're talking outrageous, extreme,
 10 flagrant, heinous and grievous.

11 So this is not a case about whether you
 12 think Mr. Ray had a good program, good company, had
 13 good procedures. This is a criminal case where the
 14 failure to perceive something, the risk of
 15 substantial and unjustifiable risk of death, was
 16 flagrant, heinous, extreme, outrageous, or
 17 grievous. Mixed that up a little.

18 But that's what this case is about, not
 19 whether Mr. Ray should have done something. That's
 20 a civil case. Not whether you can reverse engineer
 21 this case and find all the points where something
 22 could have been done better. That's not this case.
 23 This case is what I just described to you. They
 24 got to prove beyond a reasonable doubt that his
 25 failure to perceive was all of those things.

1 And here's the problem that they have:
 2 Here's the basic problem they have. There were 50
 3 people inside that sweat lodge. There were almost
 4 a dozen people outside of the sweat lodge. There
 5 were folks right next to the people who passed
 6 away. There were people right next to other people
 7 who weren't feeling well. And every single witness
 8 you heard from, all of them reasonable people, did
 9 not know, did not perceive, a substantial,
 10 unjustifiable risk of death.

11 I am not blaming anybody. Nobody knew.
 12 But you cannot, based on that evidence with all
 13 those folks seeing the same things from different
 14 angles, including people touching the people who
 15 passed away -- you cannot say beyond a reasonable
 16 doubt that it was a grievous -- I'm sorry --
 17 flagrant, extreme, outrageous, heinous, or grievous
 18 failure to perceive when every single person
 19 sitting there did not perceive it.

20 And you don't have to take my word that
 21 there was confusion inside the sweat lodge even
 22 though it's common sense and obvious. You don't
 23 have to take my word for it, because you can listen
 24 to one of the state's -- one of the state's last
 25 witnesses, Ms. Rainey.

1 Now, remember her. She's not a big fan
 2 of Mr. Ray's anymore. Okay? But here's what she
 3 testified: She says that as she was leaving, she
 4 got in a conversation with Mr. Ray, and she
 5 misunderstood. She thought that Mr. Ray was
 6 telling her that she couldn't leave. So the
 7 question, question: As you were leaving and you
 8 hear Mr. Ray say no, you realize that he's speaking
 9 to someone else; correct?

10 Answer: Yes.

11 Question: And so for that brief moment
 12 in time, you thought Mr. Ray was speaking to you,
 13 but, in fact, he was not?

14 Answer: Correct.

15 Question: And you told us that it was
 16 unclear who he was talking to. There was a lot
 17 of -- lots of conversation going on; correct?

18 Answer: Yes.

19 Now, she's literally having a
 20 conversation with Mr. Ray when she's right at the
 21 door, and she's not understanding who is talking to
 22 who.

23 Now, I'll give you the last part.

24 Question: Now, actually, I wrote this
 25 down. Actually, when you made that eye contact and

1 gave him the are-you-kidding-me kind of look, he
 2 actually confirmed it was okay for you to leave;
 3 correct?

4 Answer: Yes.

5 So don't let the state pretend that --
 6 that actually she was being barred at the door.
 7 That's not what happened. The point is that she's
 8 right next to Mr. Ray, and she does not even know
 9 who she's talking to.

10 And so that's the problem that the state
 11 has with this. You've got a medical doctor, a
 12 reasonable person, Jeanne Armstrong, who said, I
 13 didn't know what was going on. I -- I would have
 14 stopped it. You bet I would have stopped the
 15 ceremony.

16 And what did she do when the ceremony was
 17 over and there were hurt people? What did she do?
 18 She took over. She took charge. You know. She
 19 coordinated the CPR. Because she's not a robot.
 20 She's there -- you know -- she's a doctor. And she
 21 didn't know. Nell Wagoner, doctor. She didn't
 22 know.

23 The truth is we know now in -- with
 24 hindsight that it was a terrible tragedy that
 25 things were happening. We know now. But the 50

1 people inside the lodge didn't know at the time.
 2 The Angel Valley folks on the outside didn't know.
 3 The volunteers didn't know. Nobody knew.
 4 Everybody thought this would be an event, a tough
 5 event, and that people would have to work hard to
 6 get through it. But nobody knew folks were dying.
 7 And nobody could have known. And certainly not
 8 beyond a reasonable doubt.

9 There is a real possibility that nobody
 10 could have known because, in fact, nobody did know.
 11 And you heard it from every witness who took the
 12 stand they didn't know. Every single witness.

13 THE COURT: Mr. Li, if we can take a break
 14 now.

15 MR. LI: Yes.

16 THE COURT: Ladies and gentlemen, we will take
 17 a recess. Please be reassembled at a quarter till.
 18 And, again, all aspects of the admonition continue
 19 to apply. Do not communicate even among yourselves
 20 with anyone.

21 Thank you. We're in recess.

22 (Proceedings continued outside presence
 23 of jury.)

24 THE COURT: The record will show the presence
 25 of Mr. Ray and the attorneys, not the jury. And

1 I've asked Heidi to come out and get some general
2 ideas about scheduling, but I want to put
3 everything on the record and see what people think.
4 I have no set -- I had some ideas that are just
5 independent, whatever, from the indications I've
6 had now.

7 But, Mr. Li, I would start with you.
8 When we recessed at 2:35, you were exactly at six
9 hours.

10 MR. LI: Your Honor, I think I've got about
11 six minutes left.

12 THE COURT: Okay.

13 And, Ms. Polk, so if we have the jury
14 back in, let's say, at 3:00 and Mr. Li is, in fact,
15 done by 10 after, what would that mean for you, and
16 what would you be suggesting? You have roughly
17 three and a half hours all together.

18 MS. POLK: I do. And I will not be able to
19 finish this afternoon. My preference at this
20 point -- given the fact that we had a request from
21 one the jurors to be able to leave an hour or two
22 early today, my request would be that Mr. Li take
23 his time. When he finishes, then we could release
24 the jury and come back next Tuesday.

25 THE COURT: You said you had about 15 or 20

1 minutes of setup? Somebody indicated --

2 MS. POLK: I do.

3 THE COURT: So that would mean at the earliest
4 3:30. And you're estimating two hours; is that
5 right? Somewhere around there?

6 MS. POLK: It's hard for me to estimate at
7 this point, but I would like the option of using
8 the full -- by my count, I only took two and a half
9 hours --

10 THE COURT: That's right.

11 MS. POLK: And I would have more than three
12 hours left --

13 THE COURT: You do.

14 MS. POLK: I'd like to have the ability. I'm
15 not saying I'll take that long. But I am certain I
16 wouldn't be able to finish up today.

17 THE COURT: Mr. Li, that would be my
18 inclination. You just take your time and finish.
19 And we'll start 9:15 on Tuesday. I am going to
20 tell the jurors, though, that, at least from my
21 standpoint, Wednesday is going to be available. I
22 want them to have that in mind. So I would hope
23 the case would get to them by late morning on
24 Tuesday.

25 Ms. Polk, I'm thinking maybe late morning

1 or right after lunch perhaps on Wednesday, I mean
2 on Tuesday. And then have -- and then make that
3 Wednesday -- at least Wednesday available. From my
4 standpoint, I would probably want to work with
5 Thursday too. We are in that situation where the
6 jurors have been told they don't need to plan on
7 Thursday. So we have to respect that, I think.

8 So, Mr. Li --

9 MR. LI: Your Honor, I defer to the Court
10 obviously.

11 THE COURT: You've indicated that. I would
12 ask that you would be -- if you have your arguments
13 complete, if you could have that by 4:00 anyway.

14 MR. LI: Certainly, Your Honor. It will be
15 complete before then.

16 THE COURT: We'll get the jury back in.

17 Thank you.

18 (Proceedings continued in the presence of
19 jury.)

20 THE COURT: The record will show the presence
21 of Mr. Ray, the attorneys and the jury.

22 Mr. Li, you may continue.

23 MR. LI: Thank you, Your Honor. I'm almost
24 done.

25 Now, before we broke we were talking

1 about how can you say that Mr. Ray should have
2 known when 50 some-odd people didn't know? How can
3 you say that Mr. Ray's conduct was a gross
4 deviation, flagrant, extreme, when 50 people didn't
5 know?

6 I'm going to show you this chart that
7 you've seen over and over again. This is the
8 diagram of the sweat lodge. And, as you will
9 recall, Mr. Ray was seated right here. You will
10 also recall that Nell Wagoner, the doctor, was
11 seated right there right on the other side of the
12 door.

13 So when you hear the state say and
14 somebody was dragged by Mr. Ray unconscious, why
15 didn't he stop it then, that shows -- proves beyond
16 a reasonable doubt that it was a gross deviation
17 from what a reasonable person would do. That same
18 person is being dragged right by Dr. Nell Wagoner,
19 who is a doctor. And you heard her testimony that
20 if she had known something was wrong, she would
21 have stopped the event. You heard her. You heard
22 her testify.

23 But the state wants you to ignore that
24 and say well, even though a doctor who's a
25 reasonable person, who you saw testify, testify

1 didn't know and didn't think something was wrong.
 2 And in her mind there is a big difference, as with
 3 all the doctors you've heard from except from
 4 Dr. Dickson -- there is a big difference between
 5 syncope, fainting, which happens, and coma and
 6 death, which is completely not expected.
 7 Completely not expected.

8 So you got a doctor sitting right here.
 9 You also have a doctor sitting around here,
 10 Dr. Jean Armstrong, who you heard testify. And she
 11 was a pretty steady lady. And she is the kind of
 12 person who you would want helping you if you were
 13 sick. You heard her. She was not -- she was no
 14 nonsense. Boom. State's witnesses.

15 And she would have stopped the ceremony
 16 had she known that something was wrong, that people
 17 were dying. But she's a doctor. And she
 18 understands that there is a difference between
 19 syncope, fainting, and coma and death. And she
 20 didn't think that people were dying. A doctor, two
 21 doctors, right here, let alone all the other people
 22 inside, let alone all the people outside. People
 23 just didn't know.

24 It's an accident. It's an accident. And
 25 when I started this trial, I asked each of you,

1 each of you, as reasonable people selected to be
 2 jurors, fair and impartial in this case -- at the
 3 beginning of this case I asked you what would you
 4 do if you knew that the person next to you was
 5 dying? What would you do? You'd help them. You'd
 6 help them.

7 And there were 55 people inside that
 8 sweat lodge who are reasonable, decent people who
 9 didn't know. Nobody is blaming them. They just
 10 didn't know.

11 You know, sometimes an accident no matter
 12 how tragic, no matter how horrible, is just an
 13 accident. It might be a civil case out of it, but
 14 it's an accident.

15 When we started this trial together, I
 16 asked you if you could find beyond a reasonable
 17 doubt that Mr. Ray caused three people to die by
 18 conditioning them, as the state has alleged, caused
 19 three people to die by conditioning them; whether
 20 the state has proven beyond a reasonable doubt that
 21 he caused them to die as opposed to something else.
 22 Have they proven that to you beyond a reasonable
 23 doubt? I asked you to consider that. I asked you
 24 that when you heard this trial, when you heard the
 25 state's own evidence, that's what you were going to

1 see.

2 Ladies and gentlemen, I'm going to submit
 3 to you, I'm going to tell you, I think what I told
 4 you has actually happened. I think what I told you
 5 back on March 1, and March 2 has actually happened,
 6 actually happened.

7 You heard witness after witness tell you
 8 there might have been toxins. I can't rule out
 9 organophosphates. You heard witness after witness
 10 tell you about leads not followed. I think I told
 11 you that four months ago. I think I've kept my
 12 promise.

13 And I'm going to tell you now that the
 14 state has failed to prove beyond a reasonable doubt
 15 that Mr. Ray caused, caused, three people to die
 16 with words. You can do it. You can do it. I'm
 17 going to tell you that the state has failed to
 18 prove beyond a reasonable doubt that he caused
 19 three people to die. I'm going to tell you there
 20 is a real possibility that that's not what
 21 happened.

22 I'm going to tell you that the state has
 23 also failed to prove beyond a reasonable doubt that
 24 heat stroke or hyperthermia killed these folks,
 25 that there is a real possibility that there was a

1 superseding, intervening event, toxins. There is a
 2 real possibility that the state has failed to prove
 3 that there were not toxins involved. The state's
 4 failed.

5 And I'm going to tell you that the state
 6 has also failed to prove beyond a reasonable doubt
 7 what all of you have seen, which is they failed to
 8 prove that anybody at all knew that folks were
 9 dying, that there was a substantial and
 10 unjustifiable risk of death, that there was a gross
 11 deviation, a flagrant, heinous deviation. They
 12 failed to prove that.

13 And they failed to prove that anyone
 14 could have known because nobody did. 55 reasonable
 15 people, including doctors, who were one right by
 16 the door right in the 3:00 o'clock position. They
 17 didn't know. That people sitting right next to the
 18 people that died didn't know -- touching them.
 19 Didn't know. Nobody knew.

20 So the fact that James Ray failed to
 21 perceive that folks were dying is not a gross,
 22 heinous, outrageous deviation from what 55 other
 23 reasonable people including doctors didn't know.
 24 Because they had -- they just didn't. They just
 25 didn't.

1 And so the state has failed. We spent
2 four months here, and the state has failed to prove
3 beyond a reasonable doubt. And there is a real
4 possibility, a real possibility, that the state has
5 failed. That's what I'm asking you to find.

6 Now, Ms. Polk is going to have a chance
7 to argue to you again next week. And I'm not going
8 to have a chance to stand up again and challenge
9 some of the things she says. So this is my last
10 opportunity to talk to you. And that's why I've
11 been going on so long. Because there is a lot of
12 ground to cover. So I'm trying to anticipate every
13 question that I can. I'm trying. I'm trying my
14 hardest.

15 But I want you to take my place for a
16 moment when Ms. Polk is arguing. I want you to sit
17 there and as if I'm standing behind her, right
18 here, asking questions when she's arguing. I want
19 you to ask her some questions, if you could.

20 I want you to ask her how do adults get
21 conditioned? What's the proof of that? What's the
22 proof that Mr. Shore, by all respects a decent,
23 strong, wonderful human being; Ms. Neuman;
24 Ms. Brown -- I want you to ask Ms. Polk, where is
25 the proof?

1 We've heard a lot of conjecture what was
2 in their head. You heard a lot from Beverly Bunn,
3 other people who have gone to the media, about what
4 it was like, what they were thinking. Where is the
5 proof, proof beyond a reasonable doubt, of what
6 Ms. Neuman, Ms. Brown, Mr. Shore -- where is the
7 proof beyond a reasonable doubt of what they were
8 thinking? Ask her when she's standing up here
9 saying they were conditioned to obey. Maybe she
10 won't even say that anymore.

11 Ask her where is the proof that people
12 were conditioned not to help each other out? Where
13 is the proof of that? Listen to the tape. Doesn't
14 say that. Where is the proof in the tape where
15 Mr. Ray says it's okay to pass out? Remember Mark
16 Rock is the guy who said it's okay to pass out.
17 They'll drag you out by the heels. Mark Rock says
18 that. Where's the proof?

19 Where is the proof when the actual tape
20 says if you need to get out, here's how you get
21 out? And don't be the kind of person who only
22 thinks of themselves, and Exhibit 189, Dream Team
23 guy. Be alert. Be aware. Help folks out. Where
24 is the proof? Ask her that when she gets up. Ask
25 her if -- just ask her. What's the answer? Are

1 adults in the United States of America free to
2 smoke cigarettes? Are they free to allocate what
3 sort of risks they want to do? Are they free to
4 ride motorcycles? Are they free to climb
5 mountains? Are they free? Ask what the answer to
6 that is.

7 There is something profoundly wrong with
8 this case. I told you that from the beginning.
9 This whole adults-can't-choose-for-themselves
10 theory. There is something profoundly wrong with
11 it. There is also something profoundly wrong with
12 the whole medical evidence thing, this whole lack
13 of causation, this whole investigation.

14 Ask yourselves. Why didn't anybody
15 listen to their own evidence? Why didn't anybody
16 just take the tapes that they took all the trouble
17 to make and listen to them? Why didn't they follow
18 up on that? Why didn't they test or preserve the
19 blood samples? Why not? What's the answer?

20 When Ms. Polk is up here arguing, because
21 I'm not going to have a chance to argue after, ask
22 her, hey. You're our county attorney. These are
23 county employees. You did this whole
24 investigation. Why didn't you listen to the tape
25 and why didn't you test the blood? That would have

1 been good.

2 Ask why the state didn't follow up on the
3 medical records. Why is it that -- that the
4 defense has to ask for Stephen Ray's medical
5 records? Why is that? The defense has to ask for
6 them. Why doesn't the state want to know what the
7 medical records actually say?

8 Remember Stephen Ray, Exhibit 213.
9 That's the one that he didn't have heat stroke.
10 He's one of the guys in a coma. And two doctors
11 say we don't -- patient does not appear to have
12 heat stroke. Why didn't the state follow up on
13 that?

14 Ask yourself why on October 9, less than
15 48 hours after the accident, why did the state say
16 to the Hamiltons, go ahead? Destroy the scene, the
17 crime scene. Destroy it. Do whatever you want.
18 Why didn't they bother to follow up with their own
19 criminalist, who found 2-ethyl-1-hexanol? Why
20 didn't they bother follow up with her? Why didn't
21 they even talk to her? Why did the defense have to
22 call her? Is it because of the vacation schedule?
23 Because that's what the state seemed to suggest.

24 Why didn't -- why is the defense calling
25 a criminalist in a case where cause of death seems

1 to matter? Why are we calling their own employee?
 2 What's the story on dehydration? See if
 3 she can explain it. Does it matter or does it not
 4 matter? What's the story on that? And if it
 5 doesn't matter, why is the state's own medical
 6 examiner, Dr. Lyon, sending out vitreous samples
 7 for dehydration? And why is Dr. Mosley telling you
 8 that, yeah, that's what we do? We send it out to
 9 see if they're dehydrated because that goes with
 10 heat stroke.

11 What's the story? You need it or you
 12 don't need it. If you don't need it, if
 13 dehydration means nothing, why are we listening to
 14 the stuff about the Vision Quest and people not
 15 drinking water for 36 hours? Why are we doing
 16 that? Is that because the symptoms don't back them
 17 up and now the story's got to be something else now
 18 because the symptoms don't actually back them up?
 19 Now dehydration doesn't matter? Is that why? See
 20 if they can answer that. Put it to her, right to
 21 her. What's the answer?

22 What's the state's story on cooling, on
 23 the elevated temperature? Is Dr. Wagoner -- is she
 24 just wrong or lying when she testified to you that
 25 she touched Liz Neuman and Ms. Neuman was very,

1 very cold right after she got out of the sweat
 2 lodge? Okay. Let's assume Jennifer Haley poured
 3 two cups of water on her. Fine. Let's assume
 4 that. How does she get from 104, 105, to very,
 5 very cold? How did that happen?

6 So when the state says oh, you can draw
 7 reasonable inferences, I want you to imagine me
 8 standing up. Wait a minute. Don't forget about
 9 Nell Wagoner. She's a doctor. She touched her.
 10 She said she was cold, very, very cold.

11 Why is the state asking you to speculate
 12 about that? When they say infer from the evidence,
 13 they're just saying speculate. Why is the state
 14 doing that? Is it because the objective medical
 15 data doesn't get them there, so we can just bridge
 16 it? Close enough for government work? Don't work.
 17 Let's don't look at that. Don't look at that
 18 column. Why is that? Was Dr. Nell Wagoner lying
 19 or what? What happened? State's own witness.

20 What do we do with all of this? What do
 21 we do with all these medical records? What do we
 22 do with that? Ask the state. Should we just
 23 ignore it, or is it just a bunch of doctors who
 24 don't know what they're talking about -- Dr. Neff,
 25 Dr. Kennedy? They don't know what they're talking

1 when they say it's not heat stroke or when people
 2 suspect toxins because of the symptoms? What do we
 3 do with that?

4 What do we do with the medical examiners,
 5 who are hired and paid for by the State of Arizona
 6 to figure out the cause and manner of death? What
 7 do we do with them when they tell you we can't rule
 8 out organophosphates?

9 And you got Dr. Lyon right here, 51
 10 percent it's heat stroke. But 51 percent. And he
 11 agrees that that's not beyond a reasonable doubt.
 12 What do we do with that? Because there is a big
 13 gap between these two places here. You might be
 14 able to get MicroSoft a billion dollars with this
 15 gap, but you can't convict a man of a crime with
 16 this gap.

17 And what do you do with Dr. Mosley, who
 18 says, I think it's toxins, and I can't rule out
 19 organophosphates? What do we do with that? Ask
 20 the state. Because they're going to have some time
 21 to think about this over the weekend. They're
 22 going to have three, four days to think about this.
 23 And they're going to come back and present to you
 24 their argument.

25 So when they make that argument, keep

1 this in mind. What's the story on that? Explain
 2 that. Explain why it is that the State of Arizona
 3 needs to hire another doctor instead of just
 4 relying on their medical examiner. Ask that
 5 question. What is that? Why not? Why didn't you
 6 just rely on your medical examiner? Because that's
 7 their job; right? They're paid to do that.

8 What about all these other doctors? Why
 9 didn't we hear from them? They wrote all these
 10 reports. Is it because a lot of them say things
 11 like we suspect there might be toxins? We don't
 12 know?

13 Now, the prosecutor may argue, well --
 14 you know -- the defense should have called these
 15 folks. We don't have a burden. It's the state's
 16 own evidence. This is the state's own evidence,
 17 the medical records. And it has all the problems
 18 with their case right in it.

19 So why aren't we hearing from those
 20 doctors? Is it because they, like Brent Cutshall,
 21 the doctor from Flagstaff, who say you're right. I
 22 hadn't thought of that. Pinpoint pupils, lack of
 23 elevated temperature, frothy sputum. All those
 24 things are consistent with poisoning. And I can't
 25 rule it out. Is that why?

1 Because every time somebody says that, we
2 start moving down to here. Why is that? Ask the
3 state. Because they're going to have days to think
4 about this. Ask for -- how do you ignore Dr. Paul,
5 a medical examiner and an emergency room doctor?
6 How do we ignore him? Ask the state how do we
7 ignore that?

8 The Hamiltons. The Hamiltons. Why is
9 the State of Arizona, a government -- why is the
10 government asking you to rely on that kind of
11 testimony to get you all the way over here, to
12 prove beyond a reasonable doubt, as the state has
13 said repeatedly, we've proven to you beyond a
14 reasonable doubt that there were no toxins, no
15 organophosphates at Angel Valley.

16 Really? Really? Based on what? All the
17 way over here. Based on what? Good folks at
18 Angel Valley. Ask yourselves. Why were we
19 subjected to days of that? And why did the story
20 change so much, the Hamiltons? How did it keep on
21 adapting? Why is that?

22 Is it maybe because they have fear of
23 civil liability and they love the place? I
24 understand that. Are they going to lose their
25 place? People suing them. People are suing them.

1 Bad things happen. Accidents. That's what
2 happens. Accidents happen. They're lawsuits.
3 So why are we hearing from these people
4 and their special pest control methods? Why? Ask
5 and see what the state's answer is for that. See
6 if the state can answer that one and about the rat
7 poison and the car. See if they can answer any of
8 those questions. Why are they subjecting you to
9 that?

10 Where is Rotillo? Why didn't they talk
11 to him? It's just a basic thing. One time -- let
12 me ask you a few questions. I understand he
13 doesn't speak English. But there are translators.
14 There are people in the State of Arizona apparently
15 who speak Spanish. So you can actually go talk to
16 somebody who speaks Spanish if you are a government
17 agent.

18 Why not go talk to him? Sir, can you
19 show me around this place? Do you guys use
20 pesticides? You know. Can you show me? Because
21 maybe I don't want to hear from the Hamiltons right
22 off the bat. Maybe I should just hear from the
23 people who actually work the land.

24 Sir, can you tell me? Can you show me
25 where you store your stuff? Sure. Yeah. I just

1 use this stuff here. This would be a totally
2 different case if that had happened; right? But we
3 never heard from Mr. Vasquez. Never heard from
4 him. Why not? Why didn't the government even talk
5 to him? That would have been helpful.

6 Why did the state test for
7 organophosphates 17 months late? And why -- why
8 did they wait until after I give my opening
9 statement to say, hey, by the way, you know this
10 test we did? They're not reliable. Exhibit 1001.
11 Why did they wait?

12 Is that how you want your system to work?
13 Are you okay with the fact that Mr. Rock -- that
14 the State of Arizona asked for immunity for not --
15 perhaps not telling the truth to the police, I
16 guess, according to his story now. Immunity that
17 the State of Arizona in its zeal to prosecute this
18 case in the middle of this case -- and you heard,
19 he had to get a lawyer. The Judge said hey, you
20 might need a lawyer. And then the state said,
21 don't worry about it. Here. Have this piece of
22 paper. You're okay. Why is that?

23 And then on top of that, oh. Okay. So
24 now -- but setting all that aside and setting aside
25 the instruction that says -- you know -- you should

1 consider that, let's just rely on what he has to
2 say. Because in the opening argument you did not
3 hear the state mention anything about the immunity
4 agreement for Mr. Rock and his repressed memories
5 that came back after therapy with the Hamiltons.
6 Okay?

7 Ask yourself what is this story about the
8 therapy with the Hamiltons? Explain how that works
9 and how your repressed memories came back. What's
10 that about? Can you explain that to us? Because
11 they're going to have three, four days to think
12 about this. So let's see what sort of explanation
13 they come up with about repressed memories. Okay?
14 Don't forget that. Ask that.

15 The bottom line is this: Ask the state
16 this -- ask the state this: Did the state -- this
17 is what I said in the beginning of the case. Did
18 the state look in one direction? Did the state
19 instead of doing all this investigation, all this
20 stuff -- remember this chart Mr. Kelly did about
21 how a real investigation works where people talk to
22 each other? Circle up everyone. Let's figure out
23 what happened. This is Mr. Kelly's chart.
24 Remember that? Why didn't that happen?

25 Or is the answer actually that the state

1 looked in one direction -- as I said in my opening
2 statement, looked in one direction and one
3 direction only and didn't care, didn't have the
4 care or diligence to look at any of this?

5 And ask yourselves how does the state
6 answer for the fact that 50 some-odd people didn't
7 know, including doctors? What's the answer?

8 I started this case with you many, many
9 months ago. And one of the first things I said to
10 you was nothing in this courtroom -- first words
11 out of my mouth closing -- opening statements.
12 Nothing, nothing, nothing, in this courtroom, said
13 in this courtroom, is going to change the fact that
14 there was a tragedy that happened on
15 October 8, 2009, and that three good and decent
16 people died. Nothing at all is going to change
17 that fact.

18 And nothing I've said here is intended in
19 any way to diminish that. Nothing at all. But
20 I've been here, as has the whole team -- Mr. Kelly,
21 Ms. Do, Ms. Seifter. All of us have been here
22 because the state has failed to prove beyond a
23 reasonable doubt that Mr. Ray committed a crime.
24 The state has failed. And there is a real
25 possibility that the state has absolutely failed to

1 prove beyond a reasonable doubt that Mr. Ray
2 committed a crime. That's why I've been here.

3 Not to diminish anybody's loss but to put
4 the state to its test and to ask you is this what
5 you want from your government? Is this, this
6 months and month and months -- is this what you
7 want from your government? Is this it? Is this
8 what you want?

9 This was an accident. Every single
10 person in this room wishes it hadn't happened.
11 Every single person wishes that it hasn't happened.
12 Mr. Ray wishes, every single person wishes, this
13 hadn't happened. Every single person wishes they
14 could turn back the clock, stop time, and take this
15 tragedy away. Every single person.

16 But this is not a crime. Mr. Ray is not
17 guilty of any offense at all. Mr. Ray -- these
18 were his colleagues and friends. And they died.
19 And he's had to live with this. And he will have
20 to live with this for the rest of his life. For
21 the rest of his life.

22 This is not a crime. And you must
23 acquit. You must acquit Mr. Ray. You must hold
24 the government to that highest burden that the
25 Constitution demands. You must do that. You must

1 acquit Mr. Ray. I -- I have done all I can. I've
2 done my best. Mr. Ray's fate is in your hands.

3 Thank you.

4 THE COURT: Thank you, Mr. Li.

5 Ms. Rybar, could you move the easel so I
6 can see all the jurors.

7 Ladies and gentlemen, we will take the
8 extended weekend recess at this time. Once again,
9 you've heard this so many times through the trial.
10 Continue to follow the admonition in all respects.

11 The paragraph 11 I mentioned -- that does
12 not apply to you yet. You're not deliberating. So
13 you cannot discuss the case with anyone even among
14 yourselves. You cannot do that yet. That can only
15 happen at the very end of the case when the closing
16 arguments are completed.

17 I want to mention something about
18 scheduling. I have indicated that we're going to
19 follow what I told you about the scheduling. I
20 know the trial had some delays and were extended a
21 bit longer than we had anticipated. But I did
22 mention that -- well, for one thing, we don't do
23 trials on Mondays and not on Tuesdays if a Monday
24 is a holiday.

25 So next Tuesday is the regular trial

1 date. That's scheduled. And that's when you'll
2 return, 9:15 next Tuesday. Wednesday I had
3 indicated I wouldn't be available. I will be
4 available. But I told you that that's a day that
5 would not be a trial day. And as I indicated, I'm
6 going to live by what was represented to you. It's
7 been a long trial. Everybody appreciates all the
8 time, the effort, sacrifices you've made to be the
9 attentive jurors that you have been.

10 But if Wednesday is a possibility, I'd
11 like to know that. I'd like to let the parties
12 know that. So before you leave, if you could let
13 Ms. Rybar know that. And she can report back to
14 me.

15 So, again, take care. Follow all aspects
16 of the admonition. You just can't let anybody
17 approach you in any way to try to talk about
18 anything relating to this matter. Avoid any
19 possible media exposure, any of those things that
20 we've gone over now a number of times.

21 So we will be in recess. And I will see
22 you again at 9:15 next Tuesday.

23 Thank you.

24 (Recess.)

25 (Proceedings continued outside presence

1 of jury.)

2 THE COURT: The record will show the presence
3 of Mr. Ray and the attorneys except for Mr. Li.

4 MR. KELLY: We'd waive his presence, Judge.

5 THE COURT: Ms. Rybar just informed me
6 there -- there is some kind of an issue concerning
7 exhibits, I guess. And that's why my presence has
8 been requested.

9 MR. HUGHES: Thank you, Your Honor.
10 Your Honor, during closing arguments the defense
11 has used two -- well, a number of different
12 demonstrative exhibits, but two in particular. The
13 state requested to Mr. Li that those exhibits be
14 allowed to remain in the courtroom, be used by the
15 state in its final closing argument.

16 Mr. Li indicated that he needed to talk
17 to his defense team. And then over my very vocal
18 objection, they just carted them right out of the
19 courtroom.

20 Your Honor, it's a matter of fundamental
21 fairness and due process that the state be allowed
22 to argue these demonstrative exhibits that have
23 been published to the jury, shown to the jury, and
24 that the state be allowed to use those in its final
25 closing argument.

1 It's my understanding that Ms. Rybar has
2 the ability to retain custody of those here in a
3 safe place in the courtroom until next Tuesday
4 morning. And I would ask that those exhibits be
5 kept in the courtroom available to be shown and
6 argued to the jury by the state.

7 Thank you, Your Honor.

8 THE COURT: Mr. Kelly.

9 MR. KELLY: Judge, there are exhibits. They
10 were used by Mr. Li. We object. We will not allow
11 the state to use our own exhibits against our own
12 client. That would be ineffective assistance of
13 counsel. So there is no agreement to allow the
14 state to use them.

15 Ms. Rybar wants to take custody of them,
16 of course, we have no objection to that. But
17 they're in the little room. But we adamantly
18 object to the State of Arizona using our
19 demonstrative evidence against our client.

20 THE COURT: Okay. Of course, all the way
21 through the case there have been a number of
22 demonstrative exhibits here and gone because the
23 nature of electronic exhibits. You draw on them,
24 and then they're gone.

25 And what I'm going to do is just preserve

1 the status quo at this point. And I've never had
2 this issue. I've never had a disagreement about
3 using demonstrative exhibits before. And that's
4 not a comment on the argument in any way. It's
5 just I haven't experienced it.

6 MR. KELLY: In my entire career I've never
7 asked, and we did not ask to use the state's
8 PowerPoint to rebut in our closing. I've never
9 heard of it.

10 THE COURT: I've had it come up where jurors
11 have requested an exhibit produced for
12 demonstrative -- demonstrative purposes by a
13 witness. And the parties agree that it can become
14 an exhibit and go in. But that's a different
15 matter if parties want to agree to do that. But,
16 anyway, I just want to preserve the status quo.
17 I'm not prepared to argue this. If there is any
18 law one way or the other, I'd like to see it.

19 MR. KELLY: Judge, the exhibits are in our
20 room. It's locked over the weekend. Ms. Rybar has
21 a key. That's where they're at.

22 THE COURT: That's what I'll do. The exhibits
23 will remain in the custody. Well, they'll be here
24 in court and they will not be taken away until
25 further order.

1 MR. HUGHES: Thank you, Your Honor.
2 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE

3

4 I, Mina G Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 15th day of July, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

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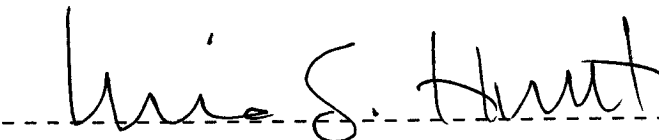
1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE
3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
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13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 15th day of July, 2011.
18
19
20
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22 
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24 MINA G. HUNT, AZ CR No. 50619
25 CA CSR No. 8335